Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

TELELECT, INC.,

Petitioner,

vs.

KENNETH EARL FENSTERMACHER,

Respondent.

TELELECT, INC'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Dated: July 27, 1994

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QUESTIONS PRESENTED

1. (a) Does a defendant in a civil case have a fundamental due process right to impeach witnesses by cross-examining them to show they are biased or have a financial interest in the outcome of the case?

   (b) If such a right exists, can a district court rely on other considerations, such as Federal Rule of Evidence 403 or the collateral source rule, to bar *all* evidence of such bias or interest?

2. Are non-expert witnesses competent to testify about an event, when they did not see the event occur, and their claimed "personal knowledge" of that event under Federal Rule of Evidence 602 is derived entirely from a re-enactment that the witnesses themselves designed and conducted?

CERTIFICATION OF PARTIES UNDER SUPREME COURT RULE 29.1

1. Plaintiff is Kenneth Earl Fenstermacher.

2. Defendant is Simon-Telelect, Inc., a Delaware corporation, sued in this case as Telelect, Inc. Simon-Telelect, Inc. is a wholly owned subsidiary of Simon United States Holdings, Inc., a Delaware corporation, which is a wholly owned subsidiary of Simon Engineering PLC of Great Britain. Simon Engineering PLC purchased the assets of Telelect, Inc., a South Dakota corporation, and transferred those assets to Simon-Telelect, Inc. Telelect, Inc. has been dissolved.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Simon-Telelect, Inc. ("Telelect"), respectfully prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Judicial Circuit affirming a judgment in favor of Respondent ("plaintiff") in the amount of $7,313,232.68.

OPINIONS BELOW

The opinion below is contained in the Order and Judgment of the United States Court of Appeals for the Tenth Judicial Circuit. It is unpublished[1] and appears at Appendix A. The district court's opinion relevant to the questions presented in this Petition is unpublished and appears at Appendix B. A second district court opinion not relevant to this Petition is not included.

JURISDICTION

The judgment for which review is sought was filed by the Tenth Circuit on March 28, 1994. Telelect timely petitioned for rehearing based upon the two issues presented in this Petition. The Tenth Circuit denied Telelect's petition for rehearing on April 29, 1994.

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[1] According to Stern, Gressman & Shapiro, "[t]he fact that a court of appeals has ordered that its opinion not be published is no bar to Supreme Court review." R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* at 40 n.2 (6th ed. 1986) (citing *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34 (1975)).

This Court has jurisdiction to review the Tenth Circuit's decision under 28 U.S.C. § 1254(1). This Petition is timely under Supreme Court Rule 13.

APPLICABLE PROVISIONS OF THE UNITED STATES CONSTITUTION AND FEDERAL RULES OF EVIDENCE

Applicable portions of U.S. Const. amend. V

> [N]or shall any person . . . be deprived of life, liberty or property, without due process of law. . . .

Applicable Federal Rules of Evidence

Fed. R. Evid. 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 602:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

SUMMARY OF THE PETITION

The principal issue at trial was whether the accident in which plaintiff was injured was caused by plaintiff's own negligence or by the claimed defective design of a product manufactured by Telelect. Plaintiff's case hinged on the testimony of three co-workers. The lower courts erroneously deprived Telelect of its fundamental due process right to show the jury that these witnesses had a motive to lie: their employer stood to gain more than two million dollars if plaintiff won the case.

The result of this error is a gross miscarriage of justice, and an opportunity for this Court to clarify the extent to which civil litigants enjoy a fundamental due process right to cross-examine adverse witnesses to expose their bias or interest. In *Davis v. Alaska*, 415 U.S. 308 (1974), and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court held that a *criminal* defendant has a Sixth Amendment right to cross-examine the witnesses against him to show their bias or interest. This Court should clarify that the Fifth Amendment and the Federal Rules of Evidence require that a *civil* litigant be afforded the same opportunity, and that this opportunity cannot be completely foreclosed under Federal Rule of Evidence 403 or any other procedural rule that excludes evidence.

Plaintiff's co-workers were not just theoretically biased; they demonstrated their commitment to helping plaintiff win the case. After the close of discovery, the co-workers participated in a secret reenactment of the accident. They could not testify about the accident itself because they did not see it happen and therefore lacked "personal knowledge" under Federal Rule of Evidence 602. At trial, they

testified instead about their observations *of the reenactment*, which purportedly showed that plaintiff was not negligent. Because of his observations of the reenactment, one of the co-workers testified he was able to "figure out" how the accident happened. Plaintiff's counsel then argued to the jury the causation mechanism suggested by the reenactment.

Despite the experimental nature of the reenactment, no expert witness designed, conducted or testified about the reenactment; it was done solely by lay witnesses and plaintiff's counsel. These lay witnesses did not testify that the reenactment had any valid scientific basis, nor could they.

The co-workers' testimony about the reenactment was highly prejudicial. These witnesses' testimony about the reenactment suggested to the jury that plaintiff was not negligent, but there was absolutely no scientific basis for believing the reenactment itself was valid. Under Rule 602, lay witnesses can testify only about matters of which they have "personal knowledge." Reenacting an accident to determine how it occurred is the exclusive province of experts.

This case offers the Court the opportunity to clarify what constitutes personal knowledge under Rule 602. Correspondingly, the Court also can determine whether testimony that goes beyond personal knowledge must be adduced through an expert witness based upon valid scientific principles.

STATEMENT OF THE CASE

Telelect seeks review of a decision of the United States Court of Appeals for the Tenth Judicial Circuit affirming a judgment against Telelect in the amount of $7,313,232.68.

Telelect manufactures insulated aerial devices, which are used by electric utility employees to work on power lines. When mounted on truck bodies, aerial devices commonly are referred to as "bucket trucks." An insulated aerial device consists of a lower boom, an elbow-like joint, a fiberglass upper boom, a metal boom tip, and one or two buckets. If properly maintained, the fiberglass in the upper boom does not conduct electricity, so there is no electrical pathway between the operator in the bucket and the ground below. If the operator's body accidentally contacts a live power line, or he allows metal parts of the boom tip to contact a live line, the operator will not be injured because there is no path for the electricity to take through the operator's body and into the ground.

While the fiberglass boom protects the operator against a *single* contact with a live line, it cannot protect against contact with two live lines, or with one live line and a ground. Because of this risk, as plaintiff admitted at trial, a lineman should carefully avoid allowing any part of a bucket truck to contact an energized line.

Plaintiff was employed as a lineman by Kansas Power & Light Co. ("KPL"). On May 14, 1989, plaintiff was injured while working in the bucket of a Telelect bucket truck. A live line, carrying 7,200 volts, contacted one of the metal parts near the end of the fiberglass boom, known as

the jib cylinder anchor bracket. The metal parts near the boom-tip are all interconnected, allowing electricity to flow among them. Among these interconnected metal parts are the jib cylinder anchor bracket and the controls used to maneuver the booms and the bucket. These metal parts normally are isolated from the ground by the fiberglass boom. Thus, even if plaintiff had touched the controls while the jib cylinder anchor bracket was touching the live line, plaintiff would not have been injured because he was not grounded.

At the time of the accident, however, plaintiff was holding in his bare hand a neutral line (*i.e.* one carrying little or no current), which grounded him and defeated the protection normally provided by the fiberglass upper boom. While still holding the neutral, plaintiff touched the controls with his other bare hand and thereby completed a circuit. Current flowed: (1) from the live line; (2) to the jib cylinder anchor bracket; (3) to the controls; (4) to plaintiff's hand; (5) through plaintiff's body to his other hand; and (6) into the grounded neutral line. Plaintiff suffered severe electrical burns that necessitated the amputation of both arms.

Three other KPL workers were present at the work site, including Howard Kenworthy, the crew foreman. At the time of the accident, all three were busy on other tasks and consequently were not watching plaintiff.

Shortly after the accident, KPL performed a comprehensive investigation. The investigators interviewed the three KPL workers who had been present, examined the bucket truck, and issued a written report finding that the accident "occurred due to human error. The employee,

while working in the primary area did not observe all applicable safety rules." In particular, the KPL investigators found that plaintiff failed to use his safety devices, including insulated rubber gloves and insulated rubber blankets and tubes to cover live lines before working near them. Moreover, the aerial device had two buckets at the end of the boom. The investigators concluded that plaintiff had violated safety rules by working without a spotter in the second bucket. Finally, the KPL investigators concluded, plaintiff was negligent by positioning the upper boom so that it was "resting on an energized phase."

Crew foreman Kenworthy wrote his own report reaching the same conclusion. KPL suspended Kenworthy without pay for ten days for failing to require plaintiff to follow the safety rules and for failing to keep watch in the moments before the accident. Neither the KPL investigators nor foreman Kenworthy assigned any blame to Telelect.

Notwithstanding these conclusions, plaintiff commenced this litigation, arguing that the design of the bucket truck was defective because it was not apparent that the metal parts near the boom-tip were interconnected. Telelect's principal defense was that the accident was caused by plaintiff's negligence. Despite the written conclusions of the KPL employees placing the blame on plaintiff, these employees completely reversed their positions at their depositions some two years later. They testified that plaintiff had broken no safety rules and contended that the accident was caused by the faulty design of the Telelect bucket truck.

The KPL employees claimed innocent reasons for their change of position. They said they did not realize at first how the design of the bucket truck had caused the

accident. Some of the employees also said they were in shock at the time they were interviewed and were not thinking clearly.

Telelect suspected that the KPL employees' dramatic reversal of position was due not to shock or better analysis, but instead was intended to assist their employer in recovering millions of dollars. This suspicion was confirmed by a KPL memorandum (referred to hereafter as the "Restitution Memo"), produced in discovery, which stated:

> We are cooperating with Mr. Nally [plaintiff's counsel] in his efforts to help Kenny and our company to receive restitution, if any is available, from the bucket truck manufacturer.

KPL had good reason to cooperate with plaintiff's counsel. Since plaintiff was injured on the job, the Kansas workers compensation statutes make KPL liable for the $2.3 million cost of plaintiff's lifetime medical care. Kansas law provides, however, that KPL is subrogated to any judgment plaintiff might recover against a third party. Kansas law further provides that KPL's subrogation right is reduced by any percentage of fault that the jury assigned to KPL.

As a result of these statutes, KPL found itself with a $2.3 million liability for plaintiff's medical care, which it could recoup only if plaintiff recovered at least that sum in a suit against a third party. Moreover, KPL could recover all its medical costs only if the jury found it blameless; the more fault assigned to KPL, the less it would recover. Thus, KPL had a multi-million dollar interest in ensuring:

(1) that plaintiff won his suit against Telelect; and (2) that the fault was assigned exclusively to Telelect.

KPL tried to strengthen plaintiff's case in other ways, as well. KPL's original report on the accident concluded that plaintiff had positioned the boom so it was "resting on an energized phase," a clear violation of KPL's safety rules. If the jury agreed with this conclusion, it would have to find plaintiff negligent, and KPL's recovery would be reduced or eliminated.

Ten days after the close of discovery, the three KPL crew members and plaintiff's counsel secretly gathered at the accident site to attempt to reenact the accident. Although plaintiff had listed two experts who were qualified in accident reconstruction, neither they nor any other experts were present. Relying on photographs taken after the accident and on their memories of the accident, which had occurred more than two years earlier, the three KPL crew members repositioned the vehicles and restaged the accident. Based on their reenactment, these linemen rejected the KPL report and concluded that plaintiff had not positioned the boom in contact with the live line.

The local rules of the District Court required plaintiff to disclose to Telelect any additional evidence discovered

after the pretrial conference.[2] Plaintiff did, in fact, disclose other new evidence. However, plaintiff never disclosed the reenactment.

At trial, plaintiff's first witness was one of the KPL linemen. He began testifying about a photograph taken during the reenactment, whereupon Telelect's counsel vehemently objected to a non-expert witness testifying about an accident re-creation:

> MR. COUGHLIN: Your Honor, we are going to object to this photograph. What this is, this is a re-creation. This is an expert photograph. You are trying to re-create an accident using this witness as an expert. This photograph was never listed as an expert recreation --

The trial court overruled the objection and permitted the non-expert witness to testify about the reenactment. The witness proceeded to testify that during the reenactment, the linemen had positioned the live line six inches below the upper boom. When the rope holding the neutral line was released, he said, the live line moved upward six inches and

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[2] At the time, Local Rule 213 of the United States District Court for the District of Kansas provided in relevant part:

> If additional witnesses or evidence are discovered after the pretrial conference, the discovering party shall immediately make this known to all parties and to the court in writing.

contacted the underside of the boom at the jib cylinder anchor bracket.

All three KPL crew members, plus four other KPL employees, testified at trial.[3] The crew members all testified about the reenactment. They and other employees also testified that plaintiff had not violated any safety rules. Despite their post-accident written findings, none of the KPL employees would admit that plaintiff was at fault.

Telelect's counsel attempted to impeach these witnesses. He asked them whether they had been instructed to cooperate with the plaintiff, but the witnesses consistently responded that their superiors had instructed them to cooperate equally with both parties. Consequently, Telelect's counsel offered in evidence the Restitution Memo to show that KPL had decided at a management level that it was cooperating with plaintiff's counsel in order to obtain restitution from Telelect.

Plaintiff's counsel objected that the Restitution Memo would reveal that plaintiff had received workers compensation payments from KPL, which would prejudice his case. They argued that the trial judge should exclude the memo under the collateral source rule and under Federal Rule of Evidence 403. Telelect's counsel argued that the Restitution Memo was critical to show the jury why the KPL witnesses consistently supported the plaintiff:

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[3] The seven KPL witnesses were: Safety Specialist Clark Blodgett, Division Manager Larry Devine, District Superintendent Paul Bennett, Linemen Robert Connell, Keith Ahlvers and Dennis Randel, and Crew Foreman Howard Kenworthy.

> MR. TURNER: Your Honor, they can't have it both ways. It seems to me like they want, on the one hand, to have these people [the KPL witnesses] come in there and cooperate with them and fight us hook and nail, then turn around and try to keep the reason out.

The district court ruled that the memo would be admitted, but only if Telelect would delete the portion revealing that KPL was seeking restitution for itself. (The district court later explained that he based his ruling both on the collateral source rule and on Rule 403. Appendix B, pages 28-29.) Plaintiff's counsel then reiterated that the ruling applied to all questioning about KPL's subrogation interest, and Telelect's counsel replied, "Yes, I understand that." As a result, Telelect's counsel was completely prevented from impeaching the KPL witnesses by cross-examining them as to their bias by reason of their employer's financial stake in the outcome of the case.

The jury returned a verdict for plaintiff and apportioned fault as follows: Telelect--98 percent; KPL--2 percent; and plaintiff--0 percent. Following post-trial motions and hearings, the district court reduced the award of compensatory damages, but added $3,750,000 in punitive damages. The final judgment was $7,313,232.68. The district court's opinion on Telelect's post-trial motion, which addresses the issues raised in this petition, is attached as Appendix B.

Telelect appealed to the Tenth Circuit. Telelect argued:

- that it had been unfairly surprised by the reenactment testimony;

- that the KPL crew members lacked "personal knowledge" of the accident under Federal Rule of Evidence 602 because they did not see whether plaintiff placed the boom in contact with the live line, and that they could not *create* such personal knowledge by designing and conducting a reenactment of the accident; and

- that the district court had deprived Telelect of a fundamental right of cross-examination by prohibiting all questioning that would have revealed that the KPL witnesses were biased because of their employer's multi-million dollar interest in the outcome of the case.

The Tenth Circuit affirmed, with Judge Garth dissenting. The court found that Telelect had failed to preserve for appeal its surprise argument. Appendix A at 8. As to the non-expert witness issue, the Tenth Circuit approved admission of the testimony by the lay witnesses because they testified only to "what they *actually observed* during the reenactment." Appendix A at 15 (emphasis in original). As to the cross-examination issue, the Tenth Circuit held that the district court did not abuse its discretion under Rule 403 in barring Telelect from presenting evidence of KPL's subrogation interest. Appendix A at 21-22. The Tenth Circuit apparently rejected Telelect's argument that it had a fundamental right to cross-examine to show bias or interest.

Judge Garth dissented and would have reversed and remanded, based on both the surprise point and the non-expert testimony point. He concurred with the majority on the cross-examination point.

The Tenth Circuit denied Telelect's motion for a stay of the mandate. Circuit Justice Ruth Bader Ginsburg then denied Telelect's petition to this Court to stay the Tenth Circuit's mandate.

REASONS FOR GRANTING THE WRIT

I.

A. THE FEDERAL RULES OF EVIDENCE AND PROCEDURAL DUE PROCESS REQUIRE THAT THE DEFENDANT IN A CIVIL CASE BE PERMITTED TO SHOW THAT KEY WITNESSES AGAINST IT ARE EMPLOYED BY A COMPANY THAT HAS A MULTI-MILLION DOLLAR STAKE IN SEEING THAT THE PLAINTIFF WINS.

The right to effective cross-examination is well settled in the criminal context. In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and *Davis v. Alaska*, 415 U.S. 308 (1974), this Court held that the Confrontation Clause of the Sixth Amendment requires that a criminal defendant be permitted to cross-examine witnesses to reveal their bias or interest. While a trial court retains discretion to determine the extent of such cross-examination, trial courts are precluded from barring any inquiry whatsoever into such areas. *Van Arsdall*, 475 U.S. at 679.

For a number of reasons, however, the contours of effective cross-examination in the civil context are less certain. First, the Court has spoken less frequently on the constitutional aspects of civil procedure than it has on criminal procedure. J. Leubsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 579 (1984).

Second, the leading civil case in the area of cross-examination, *Greene v. McElroy*, 360 U.S. 474 (1959), did not reach the issue of whether the Fifth Amendment's Due

Process Clause afforded civil litigants the right to cross-examine witnesses. While the Court there went to great lengths to define the critical role of effective cross-examination in ensuring a fair trial, the Court explicitly did so as "background." *Id.* at 499. The Court emphasized: "[w]hether those procedures under the circumstances comport with the Constitution we do not decide." *Id.* at 508.

This Court has never held, therefore, that a civil litigant has a fundamental due process right to impeach a witness by showing bias or interest. This omission resulted in a grave injustice in this case. Three key witnesses who testified against Telelect worked for KPL. Under Kansas law,[4] KPL stood to gain $2.3 million if the jury returned a verdict for the plaintiff of at least that amount. Moreover, since KPL's recovery would be reduced pro rata for any fault assigned to either KPL or the plaintiff, KPL had a strong financial interest in seeing that all the fault was assigned to Telelect. For this reason, the KPL witnesses had a powerful incentive to testify that plaintiff was blameless and that the accident was Telelect's fault.

KPL's multi-million dollar stake in the case also explains why KPL employees participated with plaintiff's counsel in a secret reenactment of the accident after their depositions had been taken and after the close of discovery. The testimony of the employees who participated in the

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[4] At the time of trial, the relevant Kansas statutes were Kan. Stat. Ann. §§ 44-501(a), 44-510(a), 44-504(b), and 44-504(d).

reenactment was the only evidence that plaintiff did not position the boom on a live line, a key issue in the case.[5]

The first question presented, therefore, addresses whether civil litigants, such as Telelect, have a fundamental due process right to inquire into the bias and interest of adverse witnesses. Although this Court has not yet expressly held that civil litigants enjoy such a right, a review of the Confrontation Clause cases and *Greene* demonstrates that such a right undoubtedly exists.

Although *Greene* was a civil case, this Court relied on it in establishing in *Davis* the Sixth Amendment right to inquire into bias or interest. The *Davis* Court stated, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function in the constitutionally protected right of cross-examination. *Greene v. McElroy*. . . ." *Davis*, 415 U.S. at 316-17. The Court in *Van Arsdall* acknowledged *Davis'* reliance upon *Greene*. 475 U.S. at 678-79.

The Court in *Greene* underscored the importance of effective cross-examination. A litigant's right to show that the evidence offered against him or her is untrue is

> even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice

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[5] This reenactment will be discussed further below under the second question presented for review.

> or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him."

Greene, 360 U.S. at 496-97. The Court observed that it "has been zealous to protect these rights from erosion," and, importantly, that "[i]t has spoken not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Id.* at 497.

The Court's discussion in *Greene* reveals the overarching importance of effective cross-examination in all litigation, civil or criminal. This Court should grant this Petition and hold that civil litigants enjoy this critically important fundamental right.

B. THE FUNDAMENTAL RIGHT TO INQUIRE INTO BIAS OR INTEREST CANNOT BE DENIED THROUGH THE USE OF RULE 403 OR ANY OTHER PROCEDURAL RULE THAT EXCLUDES EVIDENCE.

Relying on Rule 403 and Kansas' collateral source rule, the lower courts precluded Telelect from offering *any* evidence of KPL's financial stake in the outcome of the case. This was error of constitutional dimension.

The lower courts' reliance on Rule 403 and the collateral source rule is remarkably similar to arguments already rejected by this Court in the criminal context. In

Van Arsdall, the Court held that Rule 403 cannot be used to bar *all* inquiry into a witness' bias or interest. 475 U.S. at 676 & n.2.[6] In *Davis*, the Court held that an interest in maintaining the confidentiality of juvenile records cannot be used to bar *all* inquiry into a witness' bias or interest.

There are other important similarities between this case and *Davis*. Like the trial court in *Davis*, the Tenth Circuit opined here that Telelect had other ways of showing KPL's financial stake in the case:

> Telelect repeatedly made reference to KPL's responsibility for the accident, and the jury instructions and verdict form required the jury to calculate and assign liability against KPL.

Appendix A at 22. *Compare Davis*, 415 U.S. at 314-15. With all due respect to the Tenth Circuit, the jury could not possibly have known that KPL had a financial stake in the outcome. KPL was not a defendant, and the verdict forms did not permit the jury to award damages against it. While the jury was permitted to assign *fault* to KPL, any such assignment of fault merely reduced plaintiff's overall recovery from Telelect. Further, KPL's workers compensation liability and its right of subrogation to plaintiff's judgment are hardly common knowledge among jurors. Finally, plaintiff's counsel were vigilant to ensure that the jury received no hint of the workers' compensation payments that plaintiff was receiving from KPL. In short, the jury had no idea that KPL had any financial interest in the outcome.

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[6] The Court there considered an analogous Delaware Rule of Evidence 403.

* * *

A serious miscarriage of justice occurred below which should be corrected by this Court. *See* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* at 223 (6th ed. 1986). Telelect was saddled with a $7.3 million judgment based upon the testimony of witnesses whose employer had a direct financial stake in the case--a fact which was withheld from the jury. This Court should grant this Petition and hold for the first time that civil litigants have a fundamental, due process right to present evidence that opposing witnesses are biased or have a financial interest in the case. This Court should further hold that this right cannot be denied under Rule 403 or under other exclusionary principles such as the collateral source rule.

II.

UNDER FEDERAL RULE OF EVIDENCE 602, LAY WITNESSES WHO DID NOT SEE HOW AN ACCIDENT HAPPENED CANNOT USE THEIR OBSERVATION OF A REENACTMENT AS A SUBSTITUTE FOR PERSONAL KNOWLEDGE OF THE EVENT ITSELF.

This case gives the Court the opportunity to provide a much-needed definition of the term "personal knowledge" in Federal Rule of Evidence 602. The Tenth Circuit permitted lay witnesses to testify about their observations of a reenactment of the accident, when those witnesses admitted they did not see the accident itself. As Judge Garth wrote in dissent, the majority's ruling showed its "belief that first-hand knowledge of the reenactment can substitute for first-hand knowledge of the actual event." Appendix A at 34. This Court should grant certiorari to hold that "personal

knowledge" under Rule 602 means knowledge of the event itself. Personal knowledge cannot be created by means of a reenactment after the fact.

At trial, the three KPL linemen who were present at the accident scene all testified that they did not see the accident occur. Accordingly, none could testify about whether plaintiff p'aced the boom of the bucket truck on a live line. Instead, in cooperation with plaintiff's counsel, they designed and conducted a reenactment, which purportedly showed that plaintiff did not place the boom on the line. At trial, they testified about what they saw when they conducted the reenactment. No expert prepared, validated, or testified about the reenactment.

Rule 602 embodies a fundamental principle of jurisprudence: with the exception of experts, witnesses are competent to testify only about what they actually perceived. *Swajian v. General Motors Corp.*, 916 F.2d 31, 35-36 (1st Cir. 1990). *See Daubert v. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786, 2796 (1993) (referring to "the usual requirement of first-hand knowledge," which applies to "an ordinary witness"). Inherent in this principle is the notion that the things perceived must be the actual events at issue in the case. It would subvert the very purpose of a fact witness to stage an event, have the witness watch it, and then permit the witness to testify about it at trial. Yet, that is exactly what happened here.[7]

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[7] For example, the NBC television network recently admitted that it rigged collisions of General Motors pickup trucks, shown on its *Dateline* program, to ensure there would be a fire. There were numerous lawsuits pending at

(continued...)

This Court recently ruled that before an *expert* witness can testify, the trial court must determine whether the expert proposes to testify to scientific knowledge that will assist the trier of fact. *Daubert*, 113 S. Ct. at 2796. As the Court held,

> [t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.

Id. If experts, who are given "wide latitude to offer opinions" (*id.*), are subject to such a strict standard, then lay witnesses necessarily must be subject to a test no less strict. Here, however, purported analytical testimony by lay witnesses was admitted despite these witnesses' total lack of any "scientific, technical, or other specialized knowledge" of accident reconstruction. Federal Rule of Evidence 702.

Testimony can be admissible if it is based on either: (1) personal knowledge; or (2) scientific, technical or other specialized knowledge. This was neither. Instead, the courts below justified the admission of this evidence by patching together bits and pieces taken partly from the realm of fact witnesses and partly from the realm of experts. These witnesses said they were present when the accident

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[7](...continued)
the time concerning the alleged propensity of these trucks to burn following collisions. If the Tenth Circuit's reasoning were to prevail, anyone who viewed one of NBC's rigged collisions could have testified at the trial of any of these lawsuits.

occurred (but did not see it happen), claimed they recreated the accident accurately (but had no expert qualifications), and testified only to what they actually observed during the reenactment (but did not see the original event). This testimony was neither fish nor fowl. It was not based on personal knowledge, nor was it based on scientific knowledge. Thus, it was inadmissible.

The wrongful admission of this evidence seriously prejudiced Telelect's ability to defend itself. The purported reenactment, which lacked any scientific validity, carried with it a false aura of reliability. First, it was conducted and explained by utility linemen, who have special prestige as the persons who restore the power supply after blackouts, a feat most persons do not understand. Second, the linemen were actually present at the accident and told the jury they repositioned the vehicles exactly as they were when plaintiff was injured. Thus, the testimony was not merely inadmissible; it had the deceptively persuasive effect of alchemy. This Court should grant the Petition to correct the serious injustice permitted by the courts below and to define the limits of testimony by lay witnesses under Rule 602.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KENNETH EARL FENSTERMACHER,	)	MARCH 28, 1994
Plaintiff-Appellee,	)	
v.	)	No. 92-3283
TELELECT, INC., a corporation,	)	(D.C. No. 90-2159-0 (District of Kansas)
Defendant-Appellant,	)	
and	)	
DEALERS TRUCK EQUIPMENT COMPANY, INC., a corporation; MCERT, INC., formerly known as Independent Testing Laboratories, Inc.,	)	
Defendants.	)	

KENNETH EARL FENSTERMACHER, Plaintiff-Appellant, v. TELELECT, INC., a corporation; MCERT, INC., formerly known as Independent Testing Laboratories, Inc., Defendants-Appellees.	)	No. 92-3297 (D.C. No. 90-2159-0 (District of Kansas)

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Before HOLLOWAY, GARTH,** and McKAY, Circuit Judges.

In this product liability action, Defendant-Appellant Telelect, Inc., appeals from a verdict and judgment awarding compensatory and punitive damages totalling $7,313,232.68 to Plaintiff-Appellee Kenneth Earl Fenstermacher.[1] Mr. Fenstermacher, a lineman with Kansas Light and Power Company ("KPL"), suffered extensive burns while using a T-5000 series bucket truck manufactured by Telelect to work on electrical lines. As a consequence of these injuries, doctors were forced to amputate both of Mr. Fenstermacher's arms at the shoulders. Mr. Fenstermacher argued that when an exposed piece of metal on an otherwise insulated boom contacted an energized line, the metal controls in the bucket also became electrified, creating an electrical circuit between the energized line, his body, and a neutral (non-energized) wire that he was holding with his

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** Leonard I. Garth, Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

[1] Mr. Fenstermacher cross-appealed from the district court's reduction of the jury award of actual non-economic damages to comply with Kansas law, arguing that the statute in question was unconstitutional. At oral argument, Mr. Fenstermacher conceded that this argument had not been raised in the district court and that it was therefore not properly before us. Accordingly, we do not address this issue.

bare hand. Telelect argues that the district court committed four counts of reversible error.[2]

I. ADMISSION OF TESTIMONY REGARDING REENACTMENT OF THE ACCIDENT

The accident occurred while the KPL employees were in the process of replacing a broken power pole. The energized east power line, or phase, and the non-energized middle phase had been disconnected from the pole and pulled down and to the east. They were then both tied off separately to the same tree. Mr. Fenstermacher held the energized west phase aside with his gloved hands while the other employees replaced the pole. Mr. Fenstermacher re-connected the west phase then removed his gloves and maneuvered the bucket so that he could grab the neutral phase. He asked that the neutral be untied from the tree so that he could proceed to reattach it to the pole. At the moment the neutral was untied, the other employees heard a frying sound, looked up, and saw Mr. Fenstermacher on fire.

Initial KPL investigations of the accident concluded that in maneuvering the bucket to reach the neutral phase, Mr. Fenstermacher had placed the boom in such a way that an exposed piece of metal on the underside of the boom, the jib cylinder anchor bracket ("JCAB"), was resting on the energized east phase. As a result, the metal basket controls became energized; and when Mr. Fenstermacher put his

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[2] Mr. Fenstermacher's Motion for Leave to Supplement the Record and Telelect's Contingent Motion to Supplement the Record are hereby denied. We decide this case on the basis of the Record on Appeal.

hand on the controls, a circuit was formed between the east phase, the JCAB, the controls, Mr. Fenstermacher, and the neutral line. The KPL investigation placed the blame on Mr. Fenstermacher for violating various KPL work rules.

Approximately six months before trial, Mr. Fenstermacher's counsel conducted a reenactment of the accident with the assistance of the other KPL employees who were present at the time of the injury. At trial, the district court admitted into evidence several photographs taken at the time of the reenactment, as well as testimony by the other KPL employees as to what they observed during the reenactment. The KPL employees testified that they had placed the boom so that it was several inches above the east phase, and that when the neutral phase was untied from the tree, the east phase rose up several inches to come in contact with the JCAB. This testimony raised the possibility that Mr. Fenstermacher had not placed the boom in contact with the energized line, as originally concluded in the KPL investigative report.

A. Unfair Surprise

Telelect's first premise is that the reenactment was conducted in secret after the close of discovery and was not disclosed to Telelect, in violation of a local rule of court, thus unfairly surprising Telelect and prejudicing its ability to conduct a defense. We review a district court's decision to admit evidence under the abuse of discretion standard. *Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1011 (10th Cir. 1992). A ruling admitting evidence may constitute reversible error only if it affects a substantial right of a party and "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the

specific ground was not apparent from the context." Fed. R. Evid. 103(a)(1). While objections made in the heat of trial need not be perfect, the objection must "substantially satisf[y] the requirement of putting the court on notice" as to the grounds for the objection. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988).

Telelect urges this court to find that the objection to the testimony was adequate to notify the court as to the unfair surprise aspect of the objection, and that this ground for appeal was therefore adequately preserved. Telelect points to the following colloquy during the testimony of Kenneth Ahlvers, one of the KPL employees present at the accident scene, through whom the reenactment evidence was initially proffered:

> Q [by Mr. Fenstermacher's counsel]: All right. Did KPL crew members go back out to the site this last September sometime and reposition the lines, the equipment, in order to take these photographs?
>
> A: Yes, we did.
>
> Q: And was this taken --
>
> MR. COUGHLIN [Telelect's counsel]: You [sic] Honor, can we have a conference, please?
>
> (Counsel approached the bench and the following proceedings were had:)

MR. COUGHLIN: Your Honor, we are going to object to this photograph. What this is, this is a re-creation. This is an expert photograph. You are trying to re-create an accident using this witness as an expert. This witness was never listed as an expert. This photograph was never listed as an expert re-creation.

THE COURT: What did he testify, that it's exactly the way it was?

MR. COUGHLIN: He's entitled to say what he saw. This is not a re-creation, accurate re-creation. He can say what he saw. No doubt about that. But to use this photo like you are doing a re-creation with an expert, he can't do that.

MR. NALLY [Mr. Fenstermacher's counsel]: Your Honor, I'm not going --

THE COURT: They do that all the time.

MR. NALLY: I'm going to ask him if that is a fair and accurate representation of what he saw.

THE COURT: Overruled.

(R. Supp. Vol. IV at 241-42.) According to Telelect's appellate characterization, the testimony about the accident reenactment "flabbergasted" its counsel because it constituted an entirely new theory of causation.

Notwithstanding Telelect's urging, we hold that this objection was insufficient to preserve the issue of unfair surprise. Construing the objection as broadly as possible, it reveals nothing more than an objection to the presentation of alleged expert testimony by a lay witness. While it is certainly possible that Telelect's counsel were surprised, and while that surprise may well have been evident in the tone of voice in which counsel made the objection, the trial judge is not a seer and cannot be expected to divine the nature and basis for counsel's objection from cues such as tone of voice. Nor can an appellate court reviewing the record sense that an objection was on the basis of unfair surprise in the absence of a statement to that effect in the record.

In his dissent, Judge Garth concedes that the above-quoted objection--which is the objection Telelect primarily relies upon as supporting its contention that it adequately preserved the issue of surprise--does not embody an objection grounded on a theory of unfair surprise. However, Judge Garth concludes that in a different objection, some eight hundred pages later in the transcript, Telelect explicitly asserted "lack of notice." This objection, according to the dissent, in combination with another objection shortly thereafter, and considered in the context of the record as a whole, constituted sufficient notice to the court as to the alleged unfair surprise. We are not persuaded.

First, we note that in Telelect's briefs on appeal, Telelect makes no explicit reference to the objection cited by the dissent in its argument on the issue of unfair surprise. The only reference Telelect makes to the objection quoted by the dissent is to merely characterize it in passing as an "amplification" of its earlier objection. (Appellant's Br. at 16; Appellant's Reply Br. at 2.) It is evident that Telelect

relies primarily on the first objection rather than on the second objection during a different part of the trial in arguing that it sufficiently preserved for appeal the issue of unfair surprise. While there is no dispute that objections made in the heat of trial need not be perfect, the objection must be "timely" and must state "the specific ground of objection, if the specific ground was not apparent from the context." Fed. R. Evid. 103(a)(1). The objection must be "specific enough to allow the trial court to address the matter." *United States v. Mitchell*, 783 F.2d 971, 975 (10th Cir.), *cert. denied*, 479 U.S. 860 (1986). The specificity requirement contained in Rule 103 serves both to give the court and opposing counsel the opportunity to take corrective action and to avoid unnecessary error. *See United States v. Hubbard*, 603 F.2d 137, 142 (10th Cir. 1979). Unlike an appellate court, a trial court does not have the luxury of examining the entire record in an effort to determine whether it can stitch together from various objections made at different points in the trial a particular ground for an objection to the admission of evidence: even if it could do so, such an approach would deprive opposing counsel of the opportunity to take corrective action and would only contribute to chaos in the trial process. The determinative factor, we believe, is whether the subsequent objection was sufficiently specific so that it could be reasonably expected that the trial judge would be put on notice not only of the ground for that objection, but of the ground for the prior objection as well. If a subsequent objection meets this standard, such objection may be sufficient in some circumstances to preserve the earlier objection for appeal. Such is not the case here.

We believe that a close review of the objection cited in the dissent reveals that, despite the use of the phrase "lack

of notice," the objection has no relevance to the issue of alleged unfair surprise raised on appeal. On appeal, Telelect argues that Mr. Fenstermacher concealed the fact of the reenactment until trial, thus unfairly surprising Telelect with the evidence gleaned from that reenactment. This evidence, Telelect claims, constituted an entirely new theory of causation. By contrast, the objection to the testimony of Mr. Fenstermacher's expert witness relates neither to the fact of the reenactment nor to the theory of causation allegedly spawned by the reenactment. Rather, Telelect objected to Mr. Greene's testimony on the ground that it differed from what he had stated his testimony would be during his deposition. The "lack of notice" to which Telelect made reference in its objection to Mr. Greene's testimony was not to the fact of the reenactment, but to the fact that Mr. Greene was testifying as to a basis for his opinions that differed from the basis claimed in his deposition. This is especially clear from the second objection to Mr. Greene's testimony:

> COUGHLIN: Your Honor, this witness is going so far beyond his deposition, it's just unbelievable. He made no references during his deposition to any investigation, anything about a lanyard ring, nothing about it. He told me in his deposition he was not even requested to do accident reconstruction on his investigation. This is totally unfair. This man is switching.
>
> . . . .
>
> This man cannot sandbag a person, hold back his opinions in deposition and then come into

> trial. I have an opportunity to take his deposition to find out his opinions in advance.

(R. Supp. Vol. VII at 1012-13.) The trial judge, in response to Mr. Coughlin's objection, told him to bring out his concerns on cross-examination. *Id.* A review of that cross-examination further reveals the nature of Mr. Coughlin's objection. That cross-examination consisted in large part of comparing Mr. Greene's trial testimony with that given during his deposition, and impeaching Mr. Greene's trial testimony with regard to where Mr. Fenstermacher's hand was located at the time of the accident with his testimony on that issue at his deposition. (*See* R. Supp. Vol. VII at 1041-46.) At no point during the cross-examination of Mr. Ahlvers, the KPL employee through which the original testimony about the reenactment was proffered, did Telelect ever indicate that it was surprised by the existence of the reenactment, or indeed by the conclusions drawn therefrom.

Because we conclude that Telelect did not properly preserve the issue of unfair surprise with respect to the existence of the reenactment, we need not reach Telelect's claim with respect to the alleged violation of Local Rule 213 relating to discovery. Nevertheless, since the dissent is partially based on this issue, we deem it worth discussing briefly. First, after thoroughly reviewing the record, we have found no objection to the alleged violation; nor does Telelect indicate where it raised this objection in the trial court. Accordingly, we conclude that Telelect did not preserve this issue for review. The importance of this lack of an objection should not be doubted. Local Rule 213 gives the district court the discretion to admit evidence that has not been properly presented to the opposing party if, under the circumstances, the court deems such a decision just.

D. Kans. R. 213(b)(11). Telelect's failure to object to the alleged violation of the local rule deprived the district court of its opportunity to rule on the matter and to either refuse to allow the evidence in on that ground or to exercise its discretion to admit the evidence in spite of the alleged violation. This deprivation goes to the core of the general rule that we will not consider an issue not passed upon below, which rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Bradford v. United States ex rel. Dep't of Interior*, 651 F.2d 700, 704 (10th Cir. 1981) (alteration in original) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). Telelect's failure to object to the alleged violation of Rule 213 not only deprived the trial court of the opportunity to rule on the matter, but also denied Mr. Fenstermacher the opportunity to present evidence on the factual question of when it provided the photographs to Telelect. As a result, Mr. Fenstermacher was forced to move to supplement the record on appeal to supply evidence that he had provided the photographs to Telelect prior to trial, and Telelect was forced to respond with a contingent motion to supplement the record to supply contrary evidence. In light of Telelect's failure to object and the fact that the district court may under the local rule admit evidence despite failure to disclose it in advance, a decision which we would review only for an abuse of discretion, we conclude that the disruption that would be engendered by allowing the alleged violation to form the basis for appeal at this point strongly cautions against reversing on this basis. Furthermore, we believe that Telelect's failure to object on the ground that Mr.

Fenstermacher had violated Rule 213 is additional evidence that there was no unfair surprise in this case.

Finally, even were we to conclude that the issue was properly before us, we do not believe that the record (excluding the materials in the parties' respective motions to supplement the record, which motions we have denied) clearly indicates that the Local Rule was in fact violated. Contrary to the dissent's characterization, Mr. Fenstermacher does not admit that he withheld the reenactment evidence until "at best four days before trial, six months after the reenactment was completed." *Infra* at __. Rather, Mr. Fenstermacher explicitly alleges that he provided the reenactment photographs in November 1991, at most two months after the reenactment and several months prior to trial. (Appellee's Br. at 13.) Mr. Fenstermacher then states that, *at worst*, the photographs were made available four days before trial at the exhibit marking session. *Id.* and n.2. The conflicting factual assertions with regard to whether Mr. Fenstermacher provided the photographs to Telelect prior to trial make it clear that, even were we to have granted the parties' motions to supplement the record, this would be a factual dispute that must be resolved, if at all, by the district court rather than on appeal. A remand at this juncture, however, would wreak havoc and would quite possibly accomplish nothing in light of the district court's discretion to waive compliance with the disclosure rule. Given Telelect's failure to raise this issue in a timely fashion, we refuse to impose such a result.

In summary, we conclude that, properly construed, Telelect's objection preserved nothing more than the issue whether lay witnesses were improperly allowed to present expert testimony. We now turn to that question.

B. Expert Testimony by Lay Witnesses

Telelect's second contention is that the testimony relating to the accident reenactment represented improper expert testimony by law witnesses, because the persons who testified as to what happened during the accident reenactment admittedly did not see what happened at the moment of the accident itself and thus had no personal knowledge of the cause of the accident. This argument is without merit.

Federal Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Fed. R. Evid. 701. Thus, if the witnesses had no personal knowledge of the subject matter of their testimony, or if they gave testimony in the form of opinions or inferences not rationally based on their perception, the admission of their testimony was error.

We conclude that the district court did not err in allowing their testimony. A review of the record reveals that the testimony of each of the KPL employees consisted of statements that the photographs taken at the accident

re-creation accurately reflected what they observed at the accident itself.[3] They also testified as to what they observed during the reenactment. There was no improper opinion testimony, and there was no testimony that required expert qualifications.

The dissent argues that we are allowing first-hand knowledge of the reenactment to substitute for first-hand knowledge of the actual event. We emphasize that the witnesses in this case testified only as to what they *actually observed* at the time of the accident and what they *actually observed* during the reenactment. At no point did they proffer testimony not based on their personal observations. The case is therefore quite different from that in *Swajian v. General Motors Corp.*, 916 F.2d 31, 35-36 (1st Cir. 1990), cited by the dissent. *Swajian* involved the question whether, in an automobile accident, the wheel came off of the vehicle before or during the roll-over. The witness opined that the wheel separated from the vehicle prior to the roll-over, despite the fact that the witness did not observe the wheel separating. This was properly held to constitute impermissible expert testimony by a lay witness. In this case, by contrast, the witnesses testified only as to what they observed at the accident, and what they personally saw at the reenactment. The witnesses did not testify that Mr. Fenstermacher had in fact placed the boom several inches

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[3] The dissent's comment that this statement is "internally inconsistent" misses the point. The witnesses observed the position of the bucket truck and the wires immediately prior to the accident; they also observed those positions immediately afterward. The only things not observed were their positions at the moment of the accident. There was no testimony by the witnesses on this latter issue.

above the energized line: they could not properly have done so because they admitted they were not watching Mr. Fenstermacher at the moment of the accident. The witnesses only testified that, at the reenactment, they had placed the boom several inches above the line. Vigorous cross-examination was the proper way to ensure that the jury was aware of the full impact of the witnesses' lack of personal knowledge about what actually happened at the moment of the accident, and our review of the record indicates that Telelect conducted such a cross-examination. Furthermore, the dissent appears to credit Telelect's claim that the testimony regarding the reenactment went to the issue of Telelect's liability--a conclusion that we do not accept. The disputed testimony concerned whether the energized east phase rose up to contact the exposed metal bracket, or whether Mr. Fenstermacher had placed the boom so that the bracket was in contact with the energized phase. This question related not to Telelect's liability for defective design, which turned on the question whether Telelect was negligent in electrically bonding all of the metal basket controls to the exposed JCAB, but to Mr. Fenstermacher's contributory negligence in causing the accident. It thus related only to the question of the division of liability between Telelect and KPL and could not, by itself, serve to release Telelect from all liability.

II. ADMISSION OF EVIDENCE OF OTHER ACCIDENTS

At trial, Mr. Fenstermacher offered evidence of four other accidents involving the T-5000 series bucket truck, and the trial court admitted the evidence. Telelect objected to the admission of evidence of two of the four accidents. Evidence of other accidents in product liability cases may be

admitted to show notice or defect, provided that the party offering the evidence shows that "the circumstances surrounding the other accidents were substantially similar to the accident involved" in the current case. *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1407 (10th Cir. 1988). "Whether accidents are substantially similar depends largely upon the theory of the case: 'Differences in the nature of the defect alleged may affect a determination whether the accidents are substantially similar. . . . How substantial the similarity must be is in part a function of the proponent's theory of proof.'" *Id.* (quoting *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987)). The accidents need only be substantially similar, not exactly the same; and differences between the accidents not affecting their substantial similarity go to the weight of the evidence and not to its admissibility. *Id.* at 1408. We review the district court's determination of the substantial similarity of two accidents for an abuse of discretion. *Id.*

Telelect argues that one of the accidents, involving Mr. Moore, was not substantially similar to that involving Mr. Fenstermacher, and that the district court therefore erred in admitting evidence of that accident. This claim depends on the assumption that Mr. Fenstermacher's theory of the defect in this case was exclusively based on the exposure of the metal JCAB, in contrast to the Moore accident which occurred when the energized phase came in contact with the basket bracket rather than the JCAB.

We find this argument unpersuasive. It is clear from even a cursory review of the record that from the pretrial order through the closing statement, Mr. Fenstermacher's theory of liability was firmly predicated on the bonding of the various exposed metallic parts of the JCAB and other

parts of the boom with the metal controls in the bucket. (*See, e.g.*, Appellant's App. Vol. I at 69-75 (pretrial order); R. Supp. Vol. I at 7, 9, 19 and 25; R. Supp. Vol. III at 102 and 119 (Plaintiff's opening statement) and 171; R. Supp. Vol. IV at 281; R. Supp. Vol. V at 435; R. Supp. Vol. VI at 621; R. Supp. Vol. XIV at 2397, 2402, 2405, 2467 and 2469 (Plaintiff's closing argument)). We also note that the district court itself stated the theory of liability to be the so-called "bonding hazard." (R. Supp. Vol. IV at 394.) Even Telelect's counsel stated as much in Telelect's closing argument. (*See* R. Supp. Vol. XIV at 2425.) We therefore hold that the district court did not err in concluding that the Moore accident was substantially similar to the accident at issue in this case. Any differences between the two accidents went solely to the weight of the evidence, not to its admissibility.

Evidence of the second contested accident, involving Mr. Canfield, was submitted via the reading of the deposition of Telelect employee Raymond Spencer, which deposition was given in the course of discovery in another product liability case. Telelect argues that the admission of this evidence was error because the evidence consisted of double hearsay in that Mr. Spencer's deposition testimony consisted of repeating the statements of Ohio Edison employees who, in turn, were not eyewitnesses, but were merely repeating what they had been told about the accident.[4] At least on appeal, Telelect does not contest the substantial similarity of the Canfield accident.

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[4] Telelect concedes that the reading of Mr. Spencer's deposition at trial did not constitute hearsay, as it was an admission against interest under Fed. R. Evid. 801(d)(2). (Appellant's Br. at 30.)

When evidence consists of hearsay within hearsay, each level of the hearsay must fall within an exception to the hearsay rule for the evidence to be admissible.[5] Fed. R. Evid. 805. We review the trial court's decision to admit evidence for an abuse of discretion. *Boren v. Sable*, 887 F.2d 1032, 1033 (10th Cir. 1989). When reviewing the trial court's rulings on hearsay objections, we afford heightened deference to the trial court's decision. *Id.* However, if either of the levels of hearsay fails to fall within a hearsay exception, then the trial court erred in admitting the evidence.

The district court permitted the reading of the deposition, stating, "I think it does bear a certain amount of trustworthiness and since obviously you [Telelect] are playing games about producing witnesses or not, if it is incorrect, why, you can certainly bring them." (R. Supp. Vol. VI at 629.) On its face, this ruling represents an application of Rule 804(b)(5)'s residual category of hearsay exceptions.

The district court did not, however, make an explicit finding that each of the two levels of hearsay fell within the residual category. Normally, we would expect the trial court to make an explicit finding as to each level of hearsay, rather

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[5] It is not clear from the record and briefs whether evidence of the other accidents was offered to prove defect or to prove notice of the defect. To the extent the evidence may have been offered to prove notice, it was not hearsay, as it was not offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Because of the ambiguity as to the purpose of the evidence, however, we consider the availability of any hearsay exceptions.

than a global finding of indicia of reliability. However, we note that the objection to the evidence did not clearly indicate more than one level of hearsay: "Mr. Cherry [Mr. Fenstermacher's counsel] has specifically stated that Mr. Spencer was not a witness and is relying on hearsay statements of what other people said as far as how the accidents occurred." (R. Supp. Vol. VI at 622.) We do not expect instantaneous perfection in calculating the levels of hearsay for purposes of an objection. In the heat of the moment, an objection to hearsay might be sufficient to require a finding of an exception for each level. Nevertheless, we believe that in this case, given the fact that the accident report compiled by Mr. Spencer was prepared as part of Telelect's accident investigation and was of the type normally relied on, and was in fact relied on by Telelect, had Telelect's counsel clearly objected to both levels of the hearsay, the trial court would have found the residual category to cover both levels.[6] Such a ruling would not have been such an "overriding of the law by the exercise of manifestly unreasonable judgment or the result of [partiality], prejudice, bias or ill-will as shown by evidence or the record of proceedings," *Boren*, 887 F.2d at 1033 (quoting *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987), as to constitute an abuse of discretion.

We therefore hold that the trial court did not err in admitting evidence of the Moore and Canfield accidents.

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[6] The business record exception of Rule 803(6) does not apply because the accident report compiled by Mr. Spencer was not made "by, or from information transmitted by, a person with knowledge." Fed. R. Evid. 803(6).

III. RESTRICTION OF TELELECT'S CROSS-EXAMINATION OF KPL EMPLOYEES

To demonstrate KPL's incentive to place all of the blame on Telelect, namely KPL's subrogated interest in the outcome to recoup the disability payments KPL had made to Mr. Fenstermacher, Telelect wished to cross-examine the KPL employee witnesses on the subject of an internal KPL memorandum which provided in pertinent part as follows:

> The attorney (Mr. Jude Nally) representing Kenny in his third party lawsuit has requested to interview several of Kenny's co-workers. We are cooperating with Mr. Nally *in his efforts to help Kenny and our company to receive restitution, if any is available, from the bucket truck manufacturer.*

Appellant's App. Vol. I at 156 (emphasis added). At trial, Telelect offered this memorandum into evidence to impeach the testimony of KPL employees. Mr. Fenstermacher objected on Rule 403 grounds, arguing that the reference to KPL's financial interest constituted a reference to worker's compensation payments which Mr. Fenstermacher had received from KPL and that therefore the probativeness of the evidence was outweighed by its prejudicial nature. The trial court ruled that if Telelect would redact the text underlined above, the memorandum could be admitted, and Telelect acquiesced.

We review the trial court's Rule 403 weighing of the document's probativeness and likely prejudicial effect for an abuse of discretion. "The trial court has broad discretion to

determine whether or not prejudice inherent in otherwise relevant evidence outweighs its probative value." *United States v. Record*, 873 F.2d 1363, 1375 (10th Cir. 1989).

After reviewing the record, we conclude that the trial court did not abuse its discretion in directing that the memorandum be redacted and in limiting Telelect's cross-examination to bar inquiry into KPL's subrogation interest. Telelect had ample opportunity to impeach the KPL employees' testimony on the issue of their prior allegedly inconsistent statements about the cause of the accident through introduction of the KPL investigative reports. In addition, the jury was fully aware that KPL had a financial stake in the outcome regardless of the introduction of the document. Telelect repeatedly made reference to KPL's responsibility for the accident, and the jury instructions and verdict form required the jury to calculate and assign liability against KPL. On these facts, we cannot conclude that the trial court abused its discretion in ruling that the probativeness of one particular piece of evidence of KPL's interest was outweighed by the possible prejudicial effect of that evidence.

IV. DETERMINATION OF PUNITIVE DAMAGES

Kansas law provides for a separate proceeding before the trial judge to determine the amount of punitive damages to be awarded. The statute limits the amount of punitive damages to the annual gross income of the defendant, based on the defendant's highest gross income for any one of the five years immediately before the act in question, or five million dollars, whichever is less. Kans. Stat. Ann. § 60-3702(e). Telelect argues that the purchase of Telelect, Inc., a Minnesota corporation, by Simon-Telelect, Inc., a

Delaware corporation, on February 5, 1988, negates the possibility of assessing punitive damages against Simon-Telelect for the actions of Telelect, Inc.

The district court held that, by defending the action brought against Telelect, Inc., and by failing to ever raise the issue of successor corporation liability until the punitive damages proceeding, Telelect waived this issue. (Appellant's App. Vol. I at 201-06.) We agree with the district court's analysis of this objection, and hold that the issue was not properly preserved. We note in passing, however, that Telelect's premise is highly questionable, because it would allow companies to avoid liability for punitive damages through simple corporate transactions, a result clearly not contemplated by the Kansas legislature.

Telelect next argues that the award of $3,750,000 in punitive damages is excessive and should be reduced. We will reduce the award only if we conclude that the amount shocks the conscience of the court. *See Malandris v. Merrill, Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1177 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983). The trial court made substantial findings of fact to support its calculation of punitive damages under Kans. Stat. Ann. § 60-3702(b). Those findings of fact are subject to review under the clearly erroneous standard. *O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 901 (10th Cir. 1992).

After reviewing the record in this case, the briefs of the parties, and the Order of the district court, we hold that the district court's findings of fact were not clearly erroneous and that the punitive damages awarded to Mr. Fenstermacher do not "shock" the conscience of the court.

The district court's evidentiary rulings and calculation of punitive damages are AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

Garth, J., dissenting:

While I agree with all but two of the conclusions reached by the majority, I believe that Telelect's objections to Fenstermacher's use of the reenactment photographs were sufficient to preserve the issue of unfair surprise for appeal, and that, therefore, the majority rightfully should have reached the merits of Telelect's legal arguments. Having now considered those arguments, I am of the opinion that Fenstermacher's failure to notify Telelect of his intention to present the reenactment evidence, as well as Fenstermacher's introduction of the reenactment evidence via the testimony of lay witnesses who lacked first-hand knowledge of the accident itself, but who testified as to the cause of the accident based upon the reenactment evidence, infected the trial with sufficient error such that reversal and remand for a new trial are warranted. Because the majority holds otherwise, I dissent.

I.

The majority concludes that Telelect's objections to the introduction of the reenactment evidence were insufficient to preserve the issue of unfair surprise. As a result, the majority declines even to consider the question of whether or not the arguably most crucial evidence supporting the jury's $7.3 million verdict wrongfully was withheld from the defendant until immediately before trial.

As the majority points out, "[w]hile objections made in the head of trial need not be perfect, the objection must 'substantially satisf[y] the requirement of putting the court on notice' as to the grounds for the objection. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Here, while the question of preservation may be a close one, my reading of the record satisfies me that Telelect preserved the issue of surprise as to the reenactment of the evidence, and the testimony that bore upon it.

I concede that the portion of the record quoted by the majority does not contain an explicit objection grounded on a theory of unfair surprise. Telelect's opening brief, however, at page 16, draws our attention not only to the objection deemed insufficient by the majority, but also to a second series of later objections made by Telelect during the testimony of Fenstermacher's expert witness, Mr. Greene. In reviewing the rulings of a trial court, we, of course, must look to the record as a whole. When Mr. Greene took the stand, and sought to testify as to the reenactment evidence, Telelect's attorney, Mr. Coughlin, explicitly objected. Coughlin asserted "lack of notice:"

> COUGHLIN (Telelect's counsel): Your Honor, here is my problem. When I took this man's deposition, as to are you prepared to tell me today the opinions that you are going to give at trial of this case, he said, yes, sir. My next question, can it be agreed, Mr. Greene and Mr. Cherry, that if your opinions change in any way or if you do any more work in this matter, that you will notify Mr. Cherry and me promptly? Yes. Now, we were never notified about this. I

have never been able to examine this man, anything about this re-creation. He said I would be notified if he did any more work. I was never notified.

NALLY (Fenstermacher's counsel): Judge, if I might speak to that real quickly. I'll make foundation, I guess it would be reverse foundation. Mr. Greene had nothing to do with the reenactment. It was done by KPL workmen that have testified to it, and he's not qualifying these pictures. I am just asking if these would be helpful. Let me finish please. I am just offering them to short cut his explanation of if what happened is reflected in the photographs and if he can use it as demonstrative, that is all it is.

* * * *

COURT: Make your objection if you want to.

COUGHLIN: The objection is it's unfair, Your Honor, lack of notice.

COURT: Overruled.

(R. Supp. Vol. VII at 1007-1009.) After the district court judge permitted Greene to continue testifying, Mr. Coughlin again felt impelled to object:

COUGHLIN: Your Honor, this witness is going so far beyond his deposition,

it's just unbelievable. He made no references during his deposition to any investigation, anything about a lanyard ring, nothing about it. He told me in his deposition he was not even requested to do accident reconstruction on his investigation. This is totally unfair. This man is switching.

COURT: You can bring it out on cross-examination.

COUGHLIN: Judge, that is not fair. This man cannot sandbag a person, hold back his opinions in deposition and then come into trial. I have an opportunity to take his deposition to find out his opinions in advance.

NALLY: Your Honor, the witness was asked and he discussed page after page about how he said the accident happened. And now we know the defendant's theory from their opening statement. I don't know how this witness could have addressed the defendants theory long before their opening statement.

COUGHLIN: Do you know what the defendant's theory is.

NALLY: All I heard is what I heard Bill Turner say, there was a phase behind him or neutral behind him in the lanyard ring.

> COUGHLIN: I asked him if he re-created this accident. I assume he did it by the time of his deposition. I asked him give me all your opinions. He said I'm not going to give any opinion about accident re-creation.
>
> NALLY: All I am saying is to defend his own position I think he can distinguish how it's different from what he heard in opening statements, the defendant's position, and that is consistent.
>
> COURT: Well, objection is over-ruled.

(R. Supp. Vol. VII at 1012-14.)

The majority concedes that a subsequent objection may be sufficient to preserve for appeal an earlier, presumably imperfect, objection. Here, one theme, *i.e.*, unfair surprise, underlies all of Telelect's objections. I believe that these objections, taken as a whole, although not "perfect," were sufficient to "satisf[y] the requirement of putting the court on notice" as to defendant's concern that it had not been notified in a timely manner of the reenactment evidence.

II.

Rule 213 of the United States District Court for the District of Kansas requires in part that "[i]f additional witnesses or evidence are discovered after the pretrial conference, the discovering party shall immediately make

this known to all parties and to the court in writing." The record reveals that Fenstermacher failed to give Telelect proper notice of his intention to introduce the reenactment evidence.

A brief chronology bears this out. The accident at issue here occurred on May 14, 1989. Fenstermacher filed his amended complaint on October 17, 1990. The district court judge held the final pretrial conference on August 2, 1991. The court mailed its pretrial order to counsel on August 28, 1991. On September 15, 1991, Fenstermacher organized a reenactment of the accident using the three KPL crewmen who were present at the accident scene. On November 14, 1991, Fenstermacher moved to supplement his witness and exhibit lists but still did not disclose the existence of the reenactment evidence. The trial commenced on March 16, 1992.

Fenstermacher claims that the reenactment photographs were "undeniably made available" to Telelect four days before trial at an exhibit-marking session. Appellee's Br. at 12-13. Telelect asserts that it first learned of the photographs the very moment they were introduced at trial. Appellant's Br. at 15.

We have held that evidence not listed in a pre-trial order will be admitted unless its admission would be prejudicial to the objecting party. *MacCuish v. United States*, 844 F.2d 733, 736-37 (10th Cir. 1988); *Smith v. Ford Motor Co.*, 626 F.2d 784, 797 (10th Cir. 1980). *Cf. Kaufmann v. United States*, 1990 WL 58687 (April 25, 1990 D. Kan.) (denying motion to strike witness and exhibit list filed out of time under Rule 213(c) where no showing of prejudice or surprise); *Joseph Mfg. Co., Inc. v. Olympic Fire Corp.*, 781

F. Supp. 718, 721 (D. Kan. 1991) (holding pre-trial order should not be modified absent showing of manifest injustice to moving party).

Here, however, Fenstermacher has failed to explain why he withheld the reenactment evidence from the defendant, in violation of Rule 213, until, at best, four days before trial, six months after the reenactment was completed.

As mentioned previously, I conclude that Telelect's objections were sufficient to alert the district court to the disputed status of the reenactment evidence and, hence, to a violation of Rule 213, even if that rule was not explicitly mentioned. The district court rejected Telelect's objections out of hand. Had it fully considered Telelect's objections and, thus, the Rule 213 ramifications, there would have been no need for the parties before us to file motions to supplement the record on appeal.

The majority appears to credit Fenstermacher's assertion that the reenactment photographs were provided to Telelect in November 1991, two months after the reenactment took place, even though this assertion conflicts with the record before us that the reenactment evidence was withheld from Telelect until four days before trial, six months after the reenactment was completed. Even accepting Fenstermacher's contention that it delivered the reenactment photographs to Telelect in November 1991, that date is still more than three months after the final pre-trial conference was held on August 2, 1991. Notably, Fenstermacher never disclosed the reenactment evidence when he moved to supplement his witness and exhibit lists on November 14, 1991. Accordingly, whichever "disclosure" date the district court may have found had it entertained Telelect's objection,

as it should have, Fenstermacher's actions were out of time and, in effect, blatantly circumvented the relevant discovery rules, the court's pre-trial order, and the court's own rule, Rule 213.[1]

If a question of fact remained as to when Fenstermacher provided Telelect with notice of its intention to use the reenactment evidence, a possibility the majority

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[1] Rule 213 provides in relevant part as follows:

> (a) General Provision. . . . If additional witnesses or evidence are discovered after the pretrial conference, the discovering party shall immediately make this known to all parties and to the court in writing. . . .
>
> (b) Procedure at Final Pretrial Conference.
>
> . . . .
>
> (11) Ordinarily, only witnesses listed pursuant to pretrial orders may be called to give testimony at trial. However, the court may, in its discretion, permit a party to call a witness not listed by that party or any party under such circumstances as the court deems just.
>
> (c) Effect of Pretrial Order. The pretrial order, when approved by the court and filed with the clerk, together with any memorandum entered by the court at the conclusion of the final pretrial conference, will control the subsequent course of the action unless modified by the consent of the parties and the court, or by an order of the court to prevent manifest injustice.
>
> (d) Sanctions. . . .

recognizes, we would be required to remand this case to the district court for such a factual determination and the exercise of discretion pursuant to Rule 213. Unlike the majority, I do not believe such a remand would "wreak havoc," nor am I dissuaded by the possibility that remand would "accomplish nothing in light of the district court's discretion to waive compliance with the disclosure rule." We are, after all, talking about a $7.3 million verdict, and a district court judge vested with discretion, but not unlimited discretion. A district court's waiver of compliance with the court's own rules of discovery, where such waiver causes a party unjust prejudice, I believe unquestionably constitutes an abuse of discretion.

Because this reenactment evidence was a--perhaps the--crucial component of Fenstermacher's case, I believe that Fenstermacher's failure to provide Telelect with advance notice of, and an opportunity to prepare for, the introduction of this evidence strongly prejudiced both Telelect's ability to present its case, and the proceedings as a whole.

III.

I also disagree with the majority's conclusion that the district court did not abuse its discretion in denying Telelect's objection to Fenstermacher's use of lay witnesses (*i.e.*, the KPL crew members) to introduce "expert" testimony (*i.e.*, conclusions based on the reenactment evidence).

Federal Rule of Evidence 602 demands that witnesses have personal knowledge of the matters about which they testify. Rule 703 exempts expert witnesses from this requirement. Rule 701 allows a lay witness to offer his opinion when it is "rationally based on the perception of the

witness." *See Swajian v. General Motors Corp.*, 916 F.2d 31, 35-36 (1st Cir. 1990) (holding district court abused its discretion by permitting non-expert eyewitness, who lacked the perception required under Rule 701, to testify as to whether a wheel left a vehicle prior to a rollover accident where witness admitted he never saw the wheel leave the vehicle).

Here, each of the three KPL crew members admitted at trial that he did not actually see the accident occur. Thus, the majority's argument that the "photographs taken at the accident recreation accurately reflected what they [*i.e.*, the KPL employees] observed at the accident itself" is internally inconsistent. The fact of the matter is that the KPL crewmen did not witness that critical moment when the energized phase came in contact with conductive matter. Nor were the crewmen qualified as experts to derive conclusions from the reenactment exercise.

If nothing else, this uncontradicted fact that the employees did not actually see what happened at the Fenstermacher accident belies the majority's belief that first-hand knowledge of the reenactment can substitute for first-hand knowledge of the actual event. *Swajian*, *supra*, is quite on point and, if followed, as I believe it should be, would require a reversal for a new trial.

Consequently, I would hold that the district court committed reversible error when it permitted these crew members to testify as to their first-hand knowledge of the

reenactment as if such testimony was comparable to first-hand knowledge of the accident itself.[2]

IV.

The accident at issue here was, by all accounts, dreadful. There is, perhaps, no sum which can compensate Mr. Fenstermacher for wounds that will not heal and for a way of life he will never enjoy again. Nevertheless, Telelect should not be forced to pay $7,313,232.68 in damages without first having been given a fair opportunity to demonstrate that it was not responsible for Fenstermacher's injuries.

My review of the record discloses not only that the district court judge abused his discretion in admitting the reenactment evidence, and the subsequent non-expert testimony of the KPL employees, but that these issues were preserved by Telelect for our review. Fenstermacher concedes that he performed the reenactment after discovery had ended and there is no evidence in the record, beyond mere assertion, that the reenactment evidence was given to Telelect any time earlier than four days before trial.

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[2] The majority also seeks to excuse its holding by arguing that the disputed second-hand testimony of the KPL employees did not affect Telelect's liability, but only concerned the extent of Fenstermacher's contributory negligence. Inasmuch as the original accident report (Exh. 452), investigated and prepared by KPL, charged Fenstermacher alone with the negligence that caused the accident, I find it difficult to understand the majority's position that the reenactment evidence could not affect Telelect's liability.

Moreover, a fair reading of the record reveals that the KPL employees who, admittedly, were not qualified to testify as experts under Rule 703, in fact testified to, and drew conclusions about, substantially more than what they witnessed at the actual accident scene.

By admitting this evidence, the trial court, in my opinion, tainted the trial proceedings to the extent that Telelect was unfairly denied the opportunity to prove that it was not the responsible liable party.

Contrary to the majority, I would therefore reverse the decision of the district court and remand this case for a new trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

KENNETH EARL FENSTERMACHER, Plaintiff, v. TELELECT, INC. Defendant.	)	CIVIL ACTION NO. 90-2159-0

MEMORANDUM AND ORDER

This matter is before the court on defendant's motion for judgment as a matter of law or, in the alternative, for new trial (Doc. #362). For the reasons set forth below, the motion will be granted in part and denied in part.

I. Background

The court will briefly summarize the background of this products liability case. Plaintiff is a former journeyman lineman for KPL Gas Service. On May 14, 1989, plaintiff and his crew travelled to Blue Rapids, Kansas, to replace a broken pole. While he was operating an insulated aerial lift device manufactured by the defendant Telelect, Inc., plaintiff sustained severe electrical burns to the upper portion of his body. Specifically, plaintiff was injured when the jib cylinder anchor bracket on the upper portion of the lift device came into contact with an energized power line, which in turn energized the control handles of the lift device

that were internally bonded to the jib cylinder anchor bracket. Subsequent to the accident, both of plaintiff's arms were amputated at the shoulder.

Plaintiff filed the instant action against Telelect claiming that the lift device was defectively designed and contained defective warnings of hazards inherent in its use that were not open and obvious or known by the plaintiff or any expected user of the lift device. Plaintiff further claimed that the lift device exposed users to an unreasonable risk of injury and was unreasonably dangerous to users in that it failed to perform as safely as the ordinary user would expect when using the lift device in an intended or reasonably foreseeable manner.

The case was tried to a jury from March 16, 1992, until March 31, 1992. On April 1, 1992, the jury returned its verdict in favor of plaintiff. In answering the questions posed in the verdict form, the jury determined that defendant Telelect was 98% at fault in causing plaintiff's accident and that the remaining 2% of fault was attributable to plaintiff's employer, KPL Gas Service. The jury then assessed $8,154,998.12 in actual damages. Finally, the jury determined that punitive damages should be assessed against defendant Telelect.

In light of the jury's findings with respect to the issue of punitive damages, the court held a post-trial hearing on April 8, 1992, in accordance with K.S.A. 60-3702, to determine the amount of punitive damages to be awarded. On April 22, 1992, the court issued an order assessing punitive damages in the amount of $3,750,000.00. The court's order also: (1) reduced the actual damages by the percentage of fault attributable to KPL Gas Service; and

(2) reduced the amount of noneconomic damages from $3,000,000.00 to $250,000.00 in accordance with K.S.A. 60-19a02.[1]

II. Standards

The standard for granting a motion for judgment notwithstanding the verdict is precisely the same as the standard for directing a verdict. *Hurd v. American Host and Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984). In considering a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the party against whom the motion is made. *Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984). It is not the court's duty to weigh the evidence presented, or to pass upon the credibility of witnesses, or to substitute its judgment of the facts for that of the jury. *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988). A judgment notwithstanding the verdict is cautiously and sparingly granted when the court is certain the evidence "conclusively favors one party such that reasonable men would not arrive at a contrary verdict." *Western Plains Service Corp. v. Ponderosa Development Corp.*, 769 F.2d 654, 656 (10th Cir. 1985). Finally, a motion for judgment notwithstanding the verdict may not be granted unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made. *E.E.O.C. v. Univ. of Oklahoma*, 774 F.2d 999, 1001 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

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[1] The court's order reduced the actual damages to $5,301,898.16.

Motions for new trial are committed to the sound discretion of the trial court. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Brownlow v. Aman*, 740 F.2d 1476, 1491 (10th Cir. 1984). In reviewing a motion for new trial the court must view the evidence in the light most favorable to the prevailing party. *Joyce v. Davis*, 539 F.2d 1262, 1264 (10th Cir. 1976). Moreover, the court should abide by the principle "that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equipment, Inc.*, 464 U.S. at 553. Error in the admission or exclusion of evidence, and no error in ruling or order of the court or anything done or omitted by the court can be grounds for granting a new trial unless the error defect affects the substantial rights of the parties. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1148-49 (10th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978); Fed. R. Civ. P. 61. "The party seeking to set aside a jury verdict must demonstrate trial error which constitutes prejudicial error or that the verdict is not based on substantial evidence." *White v. Conoco Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983).

III. Discussion

Defendant Telelect has raised numerous arguments in support of its motion. The court will discuss each of Telelect's arguments in the order in which they are presented in its motion.

1. Sufficiency of evidence with respect to future economic and future medical damages.

Telelect attacks the jury's awards for future economic loss ($1,100,000.00) and future medical expenses ($2,900,000.00), claiming that neither award is supported by the evidence. In response, plaintiff points to various items of evidence which he contends support the two awards.

The court first turns to the jury's award of future economic loss. In *Morris v. Francisco*, 238 Kan. 71, 708 P.2d 498 (1985), the Kansas Supreme Court discussed, at length, awards for loss of future income. In pertinent part, the court stated:

> [D]amages for impairment of earning capacity cannot be recovered in a personal injury action where there is no evidence of such impairment or no evidence from which damages therefor can be calculated. Although the evidence need not show conclusively or with absolute certainty that earning capacity has been impaired, mere conjecture or speculation does not warrant an award of damages therefor in personal injury actions. All damages, however, are subject to some uncertainties and contingencies, especially those that seek to compensate for future injuries. Accordingly, most courts hold that in order to warrant a recovery for impairment of earning capacity in personal injury actions, the impairment of earning capacity must be shown with reasonable certainty or reasonable

> probability, and there must be evidence which will permit the jury to arrive at a pecuniary value of the loss.

Id. at 78 (citing 18 A.L.R.3d 88, *Evidence--Impaired Earning Capacity* § 2[a], p. 97.)

Reviewing the amount awarded for future economic loss in this case, the court agrees with the defendant that the $1,100,000.00 award is not completely supported by the evidence. The evidence presented by plaintiff clearly established that he was 100% physically disabled and would remain that way for the rest of his life. *See id.* at 78. Further, although there was minimal evidence introduced as to what plaintiff was capable of earning over the remainder of his lifetime, it was established that, at the time of the accident, he was earning approximately $40,000.00 per year. *Id.* Assuming, as the court believes is appropriate, that plaintiff would continue at this rate until age 65,[2] the court finds that plaintiff is entitled to a lump sum award of $800,000.00 for future economic loss ($40,000.00 per year multiplied by twenty years).[3] *Id.*; *see also Wahwasuck v. Kansas Power and Light Co.*, ____ Kan. ___, 828 P.2d 923,

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[2] The plaintiff did not produce any evidence concerning the possibility of future increases in income.

[3] In a footnote, defendant asserts that plaintiff is not entitled to any future economic damages or future medical expenses because he did not present evidence "by which the jury could reduce any such award[s] to present value . . . ." The court rejects this assertion. As the court notes later in this opinion, the burden was on the defendant to produce evidence of the discount rate. See pp. 9-10.

930-32 (1992). Accordingly, the court will order a remittitur in the amount of $300,000.00 so that the verdict conforms with the evidence introduced by the plaintiff.[4]

The court now turns to the award for future medical expenses. At trial, plaintiff presented two key witnesses who testified about the amount of medical expenses that plaintiff was likely to incur in the future. The first witness, Dr. John Hiebert, testified that the projected cost of future medical treatment for plaintiff, exclusive of costs for prosthetics, was between $50,000.00 and $250,000.00. The second witness, Jack M. East of the American Amputee Foundation, prepared a life care plan for plaintiff which, in conservative terms, estimated plaintiff's future expenses to be $2,055,851.55. Taking the testimony of these witnesses together, the court finds that the maximum amount of future medical expenses that would be supported by the evidence is $2,305,851.55. Accordingly, the court shall order a remittitur in the amount of $594,148.45 to properly reflect the evidence produced by the plaintiff.[5]

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[4] The $300,000.00 remittitur would be subtracted from the jury's award, thereby reducing the total future economic loss award to $800,000.00. This in turn would be multiplied by defendant's percentage of fault (98%), which would reduce the award to $784,000.00.

[5] The $594,148.45 remittitur would be subtracted from the jury's award, thereby reducing the total future medical expenses award to $2,305,851.55. This in turn would be multiplied by defendant's percentage of fault (98%), which would reduce the award to $2,259,734.52.

2. Jury's consideration of inflation.

Defendant next contends that the court erred by informing the jury, in Instruction No. 25,[6] that they could

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[6] Instruction No. 25 stated as follows:

> You are instructed that if you award plaintiff future damages, you have the duty to ascertain the present value in dollars of such future damages, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.
>
> Under these circumstances, the result is that the plaintiff will, in effect, be reimbursed in advance of the loss, and so will have the use of money which he would not have received until some future date, but for the verdict.
>
> In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of anticipated future loss, by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the

take into account inflation in determining future damages. In support of its contention, defendant asserts that inflation could not be considered by the jury because plaintiff did not introduce evidence to establish the inflation factor. Defendant also contends that "[t]he judgment for future economic and medical damages . . . cannot stand because it was not discounted to present value."

In *Miller v. Union Pacific Railroad Co.*, 900 F.2d 223 (10th Cir. 1990), the Tenth Circuit reviewed the question of when a defendant is entitled to a general present value instruction. The court first concluded that "the right to a general instruction in the absence of any evidence concerning appropriate discounting methods . . . [is] controlled by the law of the forum." *Id.* at 226. The court then held that "[t]he law in the federal courts . . . is that when, as in this case, 'neither party provides competent evidence of the inflation rate or the discount rate, the district court [or the jury] must make a lump sum award that is not adjusted for either factor.'" *Id.* (citing *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 (9th Cir. 1982)).

> verdict an award for only the present worth--the reduced amount--of the total anticipated future loss. In making your determination of any future damages, you may take into consideration any *inflation* or deflation that may reasonably be expected to occur between now and any future date involved.

(emphasis added).

Here, neither party provided "competent evidence of the inflation rate or the discount rate . . . ." *Id.* Thus, neither party was entitled to an instruction on the inflation rate or the discount rate. *Id.* Notwithstanding this fact, the court instructed the jury that they could take into account any inflation or deflation that "may reasonably be expected to occur between now and any future date involved." Assuming that it was error to have so instructed the jury, the court nonetheless finds that neither party was prejudiced by the instruction. Clearly, the court's instruction did not *require* the jury to take either the inflation rate or the discount rate into consideration in assessing future damages. *Cf. Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 339-42 (1988) (holding that the trial judge's instruction to the jury "that a zero discount rate was to be applied as a matter of law . . . improperly took from the jury the essentially factual question of the appropriate [discount] rate . . . ."); *see generally Bremenkamp v. Beverly Enterprises-Kansas, Inc.*, 762 F. Supp. 884, 889 (D. Kan. 1991) ("The law is well settled that ordinarily the assessment of damages in personal injury cases is exclusively the province of the jury."). Further, the court finds that the future damages, as reduced herein, comport with the Tenth Circuit's holding in *Miller* and accurately reflect the competent evidence presented at trial. Accordingly, the court finds that any error associated with Instruction No. 25 was harmless.

In passing, the court notes that defendant, in arguing that the jury failed to discount the future damages to present value, conveniently ignores the fact that it failed to produce

any competent evidence at trial concerning the discount rate.[7] Although *Miller* did not expressly hold that it is a defendant's duty to present such evidence, such a conclusion is implicit therein. A review of *Alma*, the case cited with approval in *Miller*, provides further support for this conclusion. In *Alma*, the Ninth Circuit specifically held that it is the plaintiff's burden to establish the inflation rate, and the defendant's burden to establish the discount rate. *See Alma*, 684 F.2d at 626; *but see DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394, 396 (3d Cir. 1984) (FELA case).

3. Sufficiency of evidence to submit the issue of punitive damages to the jury.

Defendant contends that there was not sufficient evidence to allow the jury to consider punitive liability. In support of its contention, defendant argues that, prior to the product leaving defendant's hands in March of 1987, there had been no prior accidents involving the product. Defendant further argues that "[a]ll of the evidence concerning knowledge of any unreasonable risk and alleged wantonness and willfulness was either nonspecific as to time or it dealt with the manufacturer's state of mind after the product involved in this case left the manufacturer's hands."

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[7] In its motion, defendant refers to "discount rates of 5 to 8%." However, it is unclear how defendant arrived at these figures. Clearly, they were not taken from any evidence introduced by defendant at the time of trial.

The court rejects defendant's contentions. Contrary to defendant's assertions, the record was replete with evidence indicating that defendant, at and prior to the time the product in this case was manufactured, knew of the product's defects and potential for causing serious accidents. Further, the evidence demonstrated defendant's reckless disregard for the probable consequences of the design defects.[8] Rather than referring to the specific items of evidence, the court finds it appropriate to simply quote from the court's memorandum and order of April 22, 1992, in which the court assessed punitive damages. In pertinent part, the memorandum and order stated:

> At the time the product in this case was manufactured, the likelihood of serious injury or death as a result of the hazard posed by the exposed jib cylinder anchor bracket was extremely high. In fact, the court is of the belief that the hazard created by the anchor bracket was "an accident waiting to happen." Further, the failure of Telelect to adequately warn of the hazard increased the likelihood of serious harm occurring to the user of the product. In the court's opinion, it is arguable whether the warnings provided by Telelect even "hinted" at the specific hazard and the degree of risk posed thereby.

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[8] The fact that no accidents had occurred at the time the product in this case was manufactured is irrelevant. Defendant clearly was aware of the dangers inherent in the product and took *no* steps to: (1) design out the hazards; (2) design in injury limitations; or (3) warn potential users of the hazards.

> Certainly, the hazard and the likelihood of serious bodily injury or death was clearly foreseeable to the defendant.

Fenstermacher v. Telelect, Inc., No. 90-2159 (D. Kan., April 22, 1992).

In discussing the defendant's awareness of the design defect and its potential for causing serious injuries, the court's memorandum and order of April 22, 1992, further stated:

> The court finds, based upon the overwhelming weight of the evidence, that defendant Telelect "knowingly embarked on a course of conduct dangerous to" the end-users of its lift devices. *See Mason v. Texaco*, 948 F.2d 1546, 1560 (10th Cir. 1991) (citing district court opinion). Without specifically reciting all of the evidence, the court notes that, despite its awareness of the hazard, Telelect made no effort to design out the hazard, made no effort to reduce the effects of the hazard, and only minimally and negligently attempted to warn about the hazard.

Id.

As a final matter, the court finds it necessary to briefly comment on a related argument made in defendant's motion. In a footnote to the issue of liability for punitive damages, defendant contends that "[i]n order to be seriously injured by the design in question, a lineman needed to commit no less than four negligent acts: (1) not wear both

rubber gloves; (2) not maintain a safe distance from an energized line; (3) fail to cover an energized line when in close proximity to it; and (4) make body contact with an outside ground source." Defendant continues and argues that "[t]here was *no* evidence presented that the manufacturer knew, *at or prior to March of 1987*, that each of these four negligent acts would all be performed by a trained lineman at the *same* time." (Emphasis in original.) The court finds no merit to defendant's contentions. Although defendant repeatedly attempted to argue at trial that plaintiff himself had acted negligently, the jury clearly rejected this argument. Moreover, the court finds that the weight of the evidence indicated that plaintiff was not negligent.

4. Appropriateness of punitive damages.

Defendant next argues that "[t]o the extent that the plaintiff intended to sue Simon-Telelect, Inc. or to the extent that plaintiff says that Simon-Telelect, Inc. is the defendant in this case, then the award of punitive damages made by the Court in this case violates the express language of Kan. Stat. Ann. § 60-3702(e)." The statute referred to by defendant, K.S.A. 60-3702(e), limits an award of punitive damages to "the lesser of . . . [t]he annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded . . . or . . . $5 million."

Before discussing the merits of defendant's argument, the court finds it necessary to briefly review the history of

this litigation.[9] Telelect, Inc., a Minnesota corporation, manufactured the product at issue in this case in 1987. On February 5, 1988, Simon-Telelect Inc. ("Simon-Telelect") was incorporated in Delaware and purchased the assets of Telelect, Inc. On that same date, Telelect, Inc., was dissolved. Since that time, Simon-Telelect has done business under the trade name "Telelect." According to Ron Wroench, corporate counsel for Simon-Telelect, the company did not "substantially change" as a result of the asset acquisition. Simon-Telelect continues to manufacture lift devices. Further, Simon-Telelect has continued to service lift devices manufactured prior to February 5, 1988.[10]

The instant complaint, naming Telelect, Inc., as the defendant, was filed on May 11, 1990. After filing an answer to the complaint, in which it admitted that Telelect, Inc., was a foreign corporation, defendant gave several pertinent responses to various discovery requests propounded by the plaintiff. First, defendant gave the following responses to the following requests for admissions:

> 1. That the Defendant, Telelect, Inc., has been correctly named as a defendant in the present cause in so far [sic] as the legal designation of name is concerned.

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[9] Many of the facts outlined by the court herein were *first* brought to light by the defendant during the post-trial punitive damage hearing.

[10] In particular, Simon-Telelect has engaged in a "retrofit" program to help eliminate or reduce the hazards associated with the design flaw at issue in this case.

RESPONSE: Admitted.

3. That the Defendant, Telelect, Inc., has been properly served as a party in the present cause.

RESPONSE: Admitted.

5. That this Defendant is engaged in the business of selling products such as the "similar products."

RESPONSE: Admitted, subject to the objection to definitions above.

7. That this Defendant was and is currently engaged in the business of manufacturing such a product as the "similar products."

RESPONSE: Admitted, subject to the objection to definitions above.

Further, defendant gave the following response to the following interrogatory propounded by the plaintiff:

23. Please state whether or not this Defendant currently manufactures the T-5000 series articulated aerial lift devices with a cover mounted over the heretofore exposed metallic area of the jib anchor.

. . . .

ANSWER: Yes.

The pretrial order (Doc. #261) in this case was issued on September 26, 1991. Reviewing the defendant's factual contentions and legal theories contained therein, there is simply no mention of the issue of successor liability. Nor does defendant attempt to raise any issue about its potential liability for punitive damages. Rather, defendant contended therein that: (1) the product at issue was not defective or unreasonably dangerous; (2) defendant did not fail to perform any legal duty it owed to the plaintiff in connection with the manufacture and sale of the product; and (3) the damages sustained by the plaintiff were caused by plaintiff's own negligence and/or negligence of his employer, KPL.

During the trial of this matter, defendant made no mention of the issue of successor liability. Instead, defendant raised the defenses set forth in the pretrial order. Only after the jury had returned its verdict, at the post-trial hearing on punitive damages, did defendant first attempt to assert the argument now forwarded in its motion for new trial. At the punitive damage hearing, a limited amount of evidence was presented concerning the formation of Simon-Telelect and its acquisition of the assets of Telelect, Inc.

Turning now to defendant's argument, the court finds defendant's reliance on K.S.A. 60-3702 specious. Throughout the entire course of this litigation, Telelect was silent on the issue of successor liability and implicitly admitted that it was the correct defendant and that it was potentially subject to liability for actual and punitive damages. Only after the jury returned its verdict, when it was facing substantial punitive damages, did Telelect first raise the issue of

nonliability for punitive damages.[11] Any factual issue as to Telelect's liability could and should have been raised long ago and is now waived. *See Gillespie v. First Interstate Bank*, 717 F. Supp. 649, 653 (E.D. Wis. 1989) ("It would be patently unfair to force plaintiffs to relitigate this entire matter when the issue [of successor liability] could have been raised prior to trial."). Because the issue has been waived, the court finds that Simon-Telelect is responsible for the actions of Telelect, Inc.; in effect, Simon-Telelect and Telelect, Inc., are one and the same for purposes of this action. Accordingly, the court has little trouble in concluding that it was appropriate to rely on the annual gross income of Telelect, Inc., for purposes of assessing punitive damages pursuant to K.S.A. 60-3702.[12] The court therefore finds that the judgment in this case, including punitive damages, is proper and rejects any assertion that the imposition of punitive damages is violative of K.S.A. 60-3702.[13]

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[11] It makes little sense to hold Simon-Telelect liable for compensatory damages while allowing them to escape liability for punitive damages on the basis of a cursory reading of the Kansas punitive damage statute. Defendant's argument is a triumph of form over substance.

[12] To hold otherwise would allow a corporation to escape liability for punitive damages by simply transferring its assets to a successor corporation. The court has little doubt that the Kansas legislature did not intend such a result when it implemented K.S.A. 60-3702.

[13] In its reply brief, defendant makes the following arguments: "The purpose of punitive damages is to punish the party who has committed the act complained of. Since Simon-Telelect, Inc. did nothing to cause plaintiff's injuries, imposition of punitive damages would result in punishing a

Even assuming, for purposes of argument, that defendant did not waive the issue of successor liability, the court would conclude that Simon-Telelect is responsible for actual and punitive damages in this case as a successor corporation. Kansas courts have long paid little heed to the formalities of separate corporate entities where, as here, justice favors such an approach. *See, e.g., Avery v. Safeway Cab, Transfer & Storage Co.*, 148 Kan. 321, 323-26, 80 P.2d 1099 (1938); *Altoona v. Richardson*, 81 Kan. 717, 722, 106 P. 1025 (1910). This attitude on the part of the Kansas courts is perhaps best exhibited in *Avery*, in which the Kansas Supreme Court held that, "where the transfer of assets strips a debtor corporation of all its assets, and disables the corporation from earning money to pay its debts, thus leaving creditors and holder of claims no resources to which they may look for the payment of their due, the net result is in legal effect a fraud; and the courts will subject the transferee to liability for the satisfaction of claims against the corporation whose assets it has absorbed." 148 Kan. at 324. In the instant case, not only does justice favor holding Simon-Telelect responsible for claims against Telelect, Inc., another factor favors holding Simon-Telelect liable as a successor corporation as well. Specifically, the limited evidence presented at the punitive damage hearing indicates

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company that did not commit the 'wrongful' act." These arguments make little sense because defendant has not objected to its liability for compensatory damages. Clearly, defendant is liable for both compensatory and punitive damages, or none at all.

that Simon-Telelect is merely a continuation of Telelect, Inc.[14] *See United States v. MPM Contractors, Inc.*, 763 F. Supp. 488, 493 (D. Kan. 1991).

5. Evidence of post-sale accidents.

Defendant Telelect argues that the admission of evidence concerning four similar accidents involving lift devices manufactured by Telelect was "directly contrary to the letter and intent of" K.S.A. 60-3307, which makes any "[e]vidence of any . . . changes in . . . knowledge . . . or testing knowledge . . . learned . . . subsequent to the time when the product in issue was . . . manufactured or sold by the manufacturer" inadmissible in a products liability case. *See* K.S.A. 60-3307(a). In support of this argument, Telelect alleges that the admission of the evidence violated the statute's exclusion of post-manufacture "knowledge . . . or testing knowledge."

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[14] First, there is no indication that the acquisition of assets by Simon-Telelect was an "arms-length" transaction. *See Avery*, 148 Kan. at 325. Second, the evidence indicates that the business of Simon-Telelect is identical to that of Telelect, Inc. *MPM Contractors*, 763 F. Supp. at 493. Notably, Simon-Telelect does business under the name of Telelect. Further, the limited evidence indicates that the employees of Telelect, Inc. became employees of Simon-Telelect and perform the same functions for Simon-Telelect as they performed for Telelect, Inc. *Id.* Finally, Simon-Telelect continues to produce the same aerial lift devices and markets them to the same body of customers as did Telelect, Inc. *Id.*

Defendant Telelect has clearly misinterpreted K.S.A. 60-3307. Although there is no legislative history available to guide the court in interpreting the statute, the court believes that K.S.A. 60-3307 is simply an attempt to codify the wide variety of circumstances that might fall within the purview of the rule that excludes evidence of subsequent remedial procedures.[15] *Cf. Wheeler v. John Deere Co.*, 862 F.2d 1404, 1410 n.2 (10th Cir. 1988). Defendant's argument is therefore rejected.

Defendant also asserts that the evidence concerning the other accidents was unfairly prejudicial and should have been excluded pursuant to Federal Rule of Evidence 403. The court rejects this argument as well. Although two of the witnesses who testified concerning the other accidents were amputees, the court determined at trial that "the probative value of and the need for" their testimony outweighed any

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[15] As noted in *Wheeler*, the rule prohibiting evidence of subsequent remedial procedures "rests on the policy of encouraging manufacturers to make their products as safe as possible free from the fear that their remedial measures will be used against them at trial." 862 F.2d at 1410. Defendant's interpretation of K.S.A. 60-3307 goes far beyond this policy. In short, if the court were to accept defendant's interpretation of K.S.A. 60-3307, then a manufacturer's mere knowledge of problems or accidents associated with one of its products would in turn make inadmissible evidence of those problems or accidents, regardless of whether the manufacturer had made any attempt to correct the problem.

harm likely to result from their appearance.[16] *Marsee v. United States Tobacco Co.*, 866 F.2d 319, 321 (10th Cir. 1989) (citing *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1257 (10th Cir. 1988)). Specifically, the court determined, and continues to believe, that the testimony of these witnesses was highly probative and relevant on the issue of whether the device as manufactured was unreasonably dangerous. Further, the court does not believe that the witnesses' appearance was "grim," as defendant contends in its motion. Clearly, their appearance was a far cry from the "severely disfigured, post-surgical cancer patient" referred to in *Marsee*.

6. Evidence of Moore and Canfield accidents.

Defendant contends that the court erred in admitting evidence of the Moore and Canfield accidents because such evidence "was wholly incompetent." Defendant further contends that the evidence should not have been admitted because the two accidents were not substantially similar to the accident in which plaintiff was injured.

The court's rulings concerning this evidence, and the rationale therefor, are clearly reflected in the record. The court believes that its rulings were not erroneous, nor an abuse of discretion, and, accordingly, reaffirms them. Further, the court is not convinced that the admission of this evidence adversely affected any of the defendant's substantial

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[16] Although defendant refers to the physical appearance of the two witnesses as "grim," the court believes that defendant is exaggerating the effect of the witnesses' appearance.

rights at trial. *Rasmussen Drilling, Inc.*, 571 F.2d at 1148-40; Fed. R. Civ. P. 61. Defendant's arguments are therefore rejected.

7. **Evidence of noneconomic damages.**

Defendant contends that the evidence presented by plaintiff at trial concerning "his pain and suffering, physical disfigurement, embarrassment and other noneconomic damages, should have been excluded as clearly irrelevant and extremely prejudicial." In support of its contention, defendant notes that, prior to trial, it admitted that plaintiff's noneconomic damages exceeded the $250,000.00 noneconomic damage limitation prescribed by K.S.A. 60-19a01. Defendant argues that "[p]laintiff's sole purpose and effect in introducing such evidence was to distract the jury, elicit unfair sympathy, and inflate any verdict rendered in the plaintiff's favor."

The court finds defendant's contention patently absurd. Regardless of the fact that it admitted that plaintiff's noneconomic damages were extensive, plaintiff had a clear right to present evidence to the jury on this issue. Moreover, defendant's reliance on K.S.A. 60-19a02 is misplaced. Although the statute places a cap on the amount of noneconomic damages a plaintiff can recover in a personal injury action, it clearly states that "the court shall not instruct the jury on the limitations of this [statute.]" K.S.A. 60-19a02(d). Although the statute does not expressly state that a plaintiff has a right to introduce evidence concerning noneconomic damages, it is implicit in the above-cited language that the trial is to be conducted as if the statute were nonexistent. Moreover, the court finds that limiting introduction of such evidence would preclude a

plaintiff from later challenging the constitutionality or validity of the statute, or from raising issues concerning the scope of the statute.[17]

Defendant alternatively argues that the admission of evidence concerning the damages sustained by plaintiff was extremely prejudicial to the defendant. For the reasons stated in the record, the court rejects this argument and finds that the admitted evidence was more probative than prejudicial. *See* Fed. R. Evid. 403; *see also Marsee*, 866 F.2d at 321.

8. Evidence relating to plaintiff's "failure to recall/retrofit" theory of recovery.

Defendant argues that the court "erroneously permitted plaintiff's counsel to refer to and to introduce evidence about an alleged duty of Telelect to recall or retrofit the product after March of 1987." The court finds no merit to defendant's argument. The court initially notes that defendant has failed to specifically state what evidence it is referring to in its argument. Without reference to specific items of evidence, it is extremely difficult for the

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[17] A perfect example is the issue in this case concerning whether or not damages for loss of consortium are covered by the cap on noneconomic damages. In light of defendant's position on this issue, the court doubts that the parties could have reached a stipulation on the applicable amount of such damages. Accordingly, the only appropriate solution was to first allow the jury to determine the amount of such damages and then have the court determine the applicability of the statute to such damages.

court to appropriately review defendant's argument. Nonetheless, after reviewing the notes from trial, it is the court's belief that no evidence was admitted that concerned any duty on the part of Telelect to "recall" or "retrofit" the product at issue. Further, assuming for purposes of argument that any such evidence was admitted, the court does not believe defendant's substantial rights at trial were affected thereby. *Rasmussen Drilling, Inc.*, 571 F.2d at 1148-40; Fed. R. Civ. P. 61.

9. References to post-manufacture remedial measure.

Defendant next argues that "[p]laintiff's counsel improperly and prejudicially referenced post-manufacture remedial measures in violation of the court's pretrial ruling on defendant's motion in limine and the Kansas statute precluding such evidence."[18] In support of its argument, defendant alleges that "[o]n at least two occasions, plaintiff introduced evidence concerning post-manufacture changes and proposed changes to the model T5505." According to the defendant, this evidence "concerned the subsequent placement of a cover over the jib cylinder anchor bracket, discussion of the subsequent and additional 'Band of Arrows

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[18] The Kansas statute to which defendant refers is K.S.A. 60-3307, which was discussed above in Section 5.

Warning' on the upper boom, and the investigation of a non-metallic control handle."[19]

The court rejects defendant's argument. As noted by plaintiff in his response, no evidence of subsequent remedial measures on the part of the defendant was admitted. As further noted by the plaintiff, "[a]ny evidence regarding a cover over the jib cylinder anchor bracket, the 'band of arrows' warning, or an insulated control handle was made by expert testimony on design defect and the Pitman retrofit program, prior to the manufacture of defendant's product."[20] Finally, the court notes that a very limited amount of evidence was received concerning KPL's *own* efforts to increase the safety of the product after plaintiff's accident. Such evidence clearly does not violate K.S.A. 60-3307 and was not in violation of the court's ruling on defendant's motion in limine.[21]

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[19] Defendant again fails to specify which witness' testimony it is objecting to. Although defendant refers to general items of evidence, it is difficult for the court to review defendant's argument without more specific references to the evidence.

[20] Clearly, such expert testimony was relevant to demonstrate the defectiveness of defendant's product design. Further, evidence concerning the Pitman product was relevant to demonstrate notice to the defendant.

[21] The policy underlying the prohibition against evidence concerning subsequent remedial procedures is clearly not forwarded by prohibiting evidence of a consumer's own efforts to remedy a known defect.

10. Bassingthwaite deposition.

Defendant contends that the "court erred in permitting plaintiff's counsel to present to the jury two related portions of Jim Bassingthwaite's depositions" at "two separate non-consecutive points during the trial." For the reasons stated in the record, the court finds that the admission of the deposition testimony was proper. Further, the court finds no reason to believe that defendant's substantial rights at trial were affected by the admission of the testimony on "non-consecutive" days. *Rasmussen Drilling, Inc.*, 571 F.2d at 1148-40; Fed. R. Civ. P. 61. Defendant's argument is therefore rejected.

11. Removal of juror.

During the trial, the court excused one of the jurors because of allegations of misconduct on the part of the juror made by the defendant's counsel and defendant's corporate representative. Defendant now complains that the court did not have good cause, pursuant to Federal Rule of Civil Procedure 47(c), to excuse the juror. Accordingly, defendant argues, "[e]xcusing this juror essentially gave the plaintiff an additional peremptory strike, which he was not entitled to since he had already used his statutory limit."

The court finds no merit to defendant's argument. As noted by plaintiff in his response, the defendant made the allegations of misconduct on the part of the juror and moved for mistrial on the basis of those allegations. Although defendant is correct in pointing out that the court found the allegations less than credible, it is untenable for defendant to now argue that the court did not have "good cause" for dismissing the accused juror. After the defendant made the

allegations and moved for mistrial, the court met with counsel for both sides, and interviewed the accused juror. For the reasons stated in the record, the court found, and reaffirms upon review, that it had good cause for dismissing the juror pursuant to Federal Rule of Civil Procedure 47(c). Further, the court finds that defendant was not prejudiced in any way by the dismissal of the juror.

12. Evidence of KPL Gas Service's subrogation interest.

Defendant argues that the "court erred in refusing to allow evidence of KPL Gas Service's subrogation interest in order to show the bias of its employee-witnesses."

At trial, defendant sought admission, pursuant to K.S.A. 60-3802,[22] of evidence concerning plaintiff's receipt of workmen's compensation payments. The court denied admission of this evidence pursuant to K.S.A. 60-3801(b)(1), which provides that the term "collateral source benefits," as used in K.S.A. 60-3802, does not include "[s]ervices or benefits for which a valid lien or subrogation interest

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[22] K.S.A. 60-3802 provides as follows:
In any action for personal injury or death, in which the claimant demands judgment for damages in excess of $150,000, evidence of collateral source benefits received or evidence of collateral source benefits which are reasonably expected to be received in the future shall be admissible.

exists . . . ."[23] Upon review, the court reaffirms this conclusion. Moreover, defendant has wholly failed to demonstrate that its substantial rights were affected by the court's refusal to admit the evidence. Fed. R. Civ. P. 61. In addition, the evidence was more prejudicial than probative. Fed. R. Evid. 403. Defendant's argument is therefore rejected.

13. **Accident recreation photographs.**

Defendant argues that the court "erred in permitting plaintiff to use the accident recreation photographs." In support of this argument, defendant contends that the accident recreation photos "were never listed in plaintiff's pre-trial exhibit list, and they were intentionally concealed from defense counsel at the time the parties exchanged exhibits on November 4, 1991." Defendant further contends that plaintiff's "[f]ailure to provide or disclose these photographs to defense counsel . . . made it impossible for the defendant to effectively defend itself."

The court rejects defendant's argument. First, defendant's allegations of concealment on the part of plaintiff's counsel are wholly unsupported. Second, at a minimum, defendant was made aware of the photographs several days prior to trial during the exhibit-marking session. Finally, defense counsel were given repeated opportunities to review the photographs during trial prior to their use by the plaintiff. For these reasons, and for the reasons set forth in the record, the court finds no error in the admission of the

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[23] The court's reasoning is more thoroughly explained by a review of the record.

recreation photos. Further, defendant has not demonstrated that admission of the photos affected any of its substantial rights at trial. Fed. R. Civ. P. 61.

14. Testimony of crew members.

Defendant next contends that the court "erred in allowing KPL crew members to testify as nondesignated lay expert witnesses." The court finds no merit to this argument. Defendant fails to refer to a *single* response from *any* of the KPL crew members that could reasonably be construed as expert testimony. Rather, as noted by the plaintiff, the testimony of each of the crew members fell well within the scope of Federal Rule of Evidence 701.[24] Moreover, defendant has not even attempted to demonstrate how it was prejudiced by this alleged "expert" testimony.[25]

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[24] Clearly, these witnesses were competent to testify about their jobs with KPL and the duties they performed. Further, the witnesses involved in the accident were competent to testify concerning the details of the accident.

[25] The court also finds it necessary to briefly comment on an allegation in defendant's reply brief. Therein, defendant alleges that the crew members assisted the plaintiff's counsel in taking the recreation photos "in order to come up with a uniform theory to strengthen their testimony at trial." As defendant is well aware, this allegation is wholly unsupported by evidence. As was repeatedly made clear at trial, the KPL witnesses were made available to both sides and were in no way attempting to "assist" the plaintiff or his case, let alone "synchronize" their testimony.

15. Testimony of witness Dodd.

Defendant argues that the court erred in permitting witness Edgar W. Dodd to testify after he had been present in the courtroom in violation of the exclusion rule. The court rejects this argument. As the plaintiff points out in his response, after learning that Dodd had been present in the courtroom prior to his own testimony, defendant's own counsel elected to have Dodd testify live rather than have his deposition testimony read. Moreover, as noted by the plaintiff, Dodd's live testimony was identical to his deposition testimony. Finally, and most importantly, defendant has wholly failed to demonstrate any prejudice resulting from Dodd's alleged violation of the exclusion rule.

16. Damages for loss or impairment of services.

Defendant argues that the jury's award of past and future damages for loss or impairment of services as a husband are noneconomic in nature and fall within the scope of K.S.A. 60-19a02, which places a cap of $250,000.00 on "noneconomic loss" in personal injury actions. In response, plaintiff admits that a claim for loss or impairment of services can include recovery for "the performance of matrimonial, conjugal and connubial acts and duties," but argues that it can also include recovery for "services in the household and in the discharge of . . . domestic duties, which can be easily expressed in dollars and cents or as a monetary benefit . . . ." Further, plaintiff argues, the only evidence presented in this case with respect to the claim for loss or impairment of services focused solely on services which had a "monetary benefit" to plaintiff's wife. Thus,

plaintiff argues, the damage awards should not be subject to the cap on noneconomic damages.

The statute referred to by the defendant, K.S.A. 60-19a02, provides in pertinent part as follows:

> (b) In any personal injury action, the total amount recoverable by each party from all defendants for all claims for noneconomic loss shall not exceed a sum total of $250,000.

Clearly, the question of whether the statute applies to the damages for loss or impairment of services awarded in this case depends upon whether those damages constitute "noneconomic loss." Unfortunately, the statute does not contain a definition of the term "noneconomic loss." Further, there is little Kansas case law construing the statute. *See Samsel v. Wheeler Transport Services*, 246 Kan. 336, 789 P.2d 541 (1990).

In deciding this question, the court finds it appropriate to review the nature of claims for loss or impairment of services. In Kansas, such claims are governed by K.S.A. 23-205, which provides:

> Where, through the wrong of another, a married person shall sustain personal injuries causing the loss or impairment of his or her ability to perform services, the right of action to recover damages for such loss or impairment shall vest solely in such person, and any recovery therefor, so far as it is based upon the loss or impairment of his or her ability to perform services in the household and in the

> discharge of his or her domestic duties, shall be for the benefit of such person's spouse so far as he or she shall be entitled thereto.

In *Cleveland v. Wong*, 237 Kan. 410, 701 P.2d 1301 (1985), the Kansas Supreme Court held that the terms "services" and "domestic duties," as referred to in K.S.A. 23-205, include "not only the performance of acts of manual labor about the house--taking out the trash, making repairs, drying dishes, and the like--but the performance of matrimonial, conjugal and connubial acts and duties, including social obligations, affection, and sexual relations." *Id.* at 423.

As the *Wong* definition implies, and as plaintiff suggests, such claims appear to encompass both "economic" and "noneconomic" components. Although some commentators have referred to claims for loss of consortium solely as "nonpecuniary"[26] or "noneconomic," *see, e.g.*, *Restatement (Second) of Torts* § 906 (1979); Steven P. Croley & Jon D. Hansen, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 Yale J. on Reg. 1 (1991); Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 Cornell L. Rev. 401 (1991), at least one court has expressly recognized the "economic" components of such awards. *See Edmonds v. Murphy*, 83 Md. App. 133, 165-70, 573 A.2d 853, 868-71 (1990) (holding that cap on noneconomic damages was not applicable to award for loss of homemaker's services), *aff'd*, 325

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[26] The court believes that the terms "economic" and "noneconomic" are synonymous with "pecuniary" and "nonpecuniary."

Md. 342, 601 A.2d 102 (1992); *see also United States v. Searle*, 322 Md. 1, 584 A.2d 1263 (1991).

Acknowledging these separate components, it is arguable that the "economic" components of claims for loss or impairment of services are not subject to the cap set forth in K.S.A. 60-19a02. *See Edmonds*, 83 Md. App. at 165-170. However, the court finds it unnecessary to reach this question under the facts of the instant case. Although plaintiff's wife did testify about the household duties that plaintiff performed prior to his accident, there was no evidence offered concerning the monetary value of those duties and services.[27] Accordingly, there was no basis in the record for the jury to competently determine the "economic" components of the claim. Moreover, unlike the jury in *Edmonds*, the jury in this case was instructed to award one sum for all components of the claim.[28] Thus, even assuming that the award does include separate "economic" and "noneconomic" components, it is simply impossible for the court to now separate those components for purposes of applying the damage cap.

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[27] In contrast, in *Edmonds*, there was "expert testimony . . . presented . . . as to the cost of hiring someone to perform, in the future, those household services that [the injured spouse] was no longer capable of performing." 83 Md. App. at 165, 573 A.2d at 869.

[28] In *Edmonds*, the jury was instructed to award separate amounts for "past loss of household services," "future loss of household services," and "other consortium damages." 83 Md. App. at 165, 573 A.2d at 869.

Accordingly, the court finds that the amounts awarded by the jury in this case for past and future loss or impairment of services constitute "noneconomic loss" and are thus subject to the cap set forth in K.S.A. 60-19a02. The court will thus reduce this award from the judgment entered in this case.[29]

IT IS THEREFORE ORDERED that a remittitur in the amount of $894,148.45 is hereby granted.[30] Plaintiff is hereby directed to notify the court in writing of his acceptance of the remittitur within ten (10) days from the date of this order. If plaintiff fails to so notify the court, defendant's motion for new trial will be granted on the issue of actual damages only.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to amend the judgment entered in this matter on April 22, 1992. Specifically, the Clerk of the Court is directed to enter judgment in favor of plaintiff in the amount of $4,439,498.16 in actual damages, and the

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[29] The judgment already includes an award of $250,000.00 for noneconomic loss. Thus, the amounts awarded for loss or impairment of service must be subtracted in their entirety.

[30] This amount includes the separate remittitur amounts of $300,000.00 and $594,148.45. As noted previously in the order, if plaintiff accepts the remittitur, these amounts will be subtracted from the jury's awards. The reduced amounts would then be multiplied by defendant's percentage of fault to arrive at the actual judgment.

amount of $3,750,000.00 in punitive damages, with interest at the rate of 4.55% from the date of April 22, 1992.[31]

IT IS FURTHER ORDERED that defendant Telelect, Inc.'s motion for judgment as a matter of law or, in the alternative, for new trial (Doc. #362) is granted in part and denied in part.[32]

Dated this 17th day of July, 1992, at Kansas City, Kansas.

EARL E. O'CONNOR
United States District Judge

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[31] The $4,439,498.16 figure for actual damages reflects only the reduction of $862,400.00 ($880,000.00 multiplied by 98%) for loss of impairment of services. It does not reflect the remittitur amounts referred to herein.

[32] As noted above, defendant's motion for new trial with respect to the issue of actual damages is conditionally denied. If plaintiff fails to accept the remittitur, the motion will be granted on the issue of actual damages.